DOCUMENT RESUME

ED 323 680 EC 232 105

AUTHOR	Burnim, Ira A.
TITLE	Strengthening the Role of Families in States' Early Intervention Systems: Policy Guide to Procedural Safeguards for Infants and Toddlers and Their Families under Part H of the Education of the Handicapped Act.
INSTITUTION	Council for Exceptional Children, Reston, VA. Div. for Early Childhood.; Mental Health Law Project, Washington, DC.; North Carolina Univ., Chapel Hill. Frank Porter Graham Center.
SPONS AGENCY	Carnegie Corp. of New York, N.Y.; Special Education Programs (ED/OSERS), Washington, DC.
REPORT NO	ISBN-0-86586-191-1
PUB DATE	90
CONTRACT	300-87-0163
NOTE	208p.
AVAILABLE FROM	Division for Early Childhood, Council for Exceptional Children, Publication Sales, 1920 Association Dr., Reston, VA 22091-1589 ($17.50, quantity discount available, Stock No. D409).
PUB TYPE	Guides - Non-Classroom Use (055) -- Information Analyses (070)
EDRS PRICE	MF01/PC09 Plus Postage.
DESCRIPTORS	Administrative Policy; Civil Rights Legislation; Confidentiality; *Disabilities; *Due Process; Early Childhood Education; *Early Intervention; *Educational Legislation; Educational Policy; *Federal Legislation; Federal Regulation; Parent Grievances; *Parent Rights
IDENTIFIERS	*Education of the Handicapped Act Amendments 1986

ABSTRACT

This book presents recommended policies and procedural safeguards for programs serving infants, toddlers and their families under Part H of the Education of the Handicapped Act. Policies are presented in five chapters covering: (1) consent to assessment, evaluation and services; (2) notice of parents' rights and of proposed actions; (3) right to review and correct records; (4) confidentiality of personally identifying information; and (5) administrative procedures for resolving parents' complaints. In each section key provisions of Federal law and regulations are identified followed by annotated policy recommendations. Seven appendixes include a list of members of the Procedural Safeguards Task Force, a list of 64 recommended policies, an outline of relevant legislative history, and the texts of Part H of the Education of the Handicapped Act, Federal Regulations Implementing Part H, Federal Regulations Implementing Part B, and Federal Regulations Implementing the Family Educational Rights and Privacy Act. A glossary of 17 legal and programmatic terms is also included. (PB)

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Strengthening the Role of Families in States' Early Intervention Systems

Policy Guide to Procedural Safeguards for Infants and Toddlers and Their Families under Part H of the Education of the Handicapped Act

Mental Health Law Project,
National Early Childhood Technical Assistance System and the
Division for Early Childhood of The Council for Exceptional Children

ISBN 0–86586–195–1

Stock No. D409

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Printed in the United States of America.
10 9 8 7 6 5 4 3 2 1

The material in this guide was developed jointly by the Early Intervention Advocacy program of the Mental Health Law Project (MHLP) with grant support from the Carnegie Corporation of New York, by the National Early Childhood Technical Assistance System (NEC*TAS) pursuant to contract No. 300-87-0163 from the Office of Special Education Programs, U.S. Department of Education, and by the Division for Early Childhood (DEC) of the Council for Exceptional Children (CEC). While contractors such as NEC*TAS are free to express their judgments in professional and technical matters, points of view in this publication do not necessarily represent those of the Department of Education. Mention of trade names, commercial products or organizations does not constitute endorsement by the U.S. Government.

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MHLP is a nonprofit national legal advocacy organization, formed in 1972, working to establish and protect the rights of adults and children with mental or developmental disabilities and to generate appropriate services to meet their needs. Its Early Intervention Advocacy program works for effective implementation of Part H, coordinating and assisting MHLP's Early Intervention Advocacy Network of parents, providers and children's advocates in every state.

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NEC*TAS is a collaborative system coordinated by Frank Porter Graham Child Development Center, The University of North Carolina at Chapel Hill, with:

- Department of Special Education, University of Hawaii at Manoa
- Georgetown University Child Development Center
- National Association of State Directors of Special Education (NASDSE)
- National Center for Clinical Infant Programs (NCCIP)
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DEC is a professional organization designed for individuals who work with infants and young children who have special needs. It was formed as a Division of The Council for Exceptional Children in 1973 and currently has more than 6,500 members. The Division for Early Childhood is dedicated to the goals of:

- Promoting the education of all young children and infants with special needs.
- Promoting involvement of parents in the children's development.
- Stimulating communication among early childhood organizations and practitioners.
- Disseminating information about research, resources and current trends and issues.

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"Part H recognizes the unique role that families play in the development of infants and toddlers with handicaps. It is clear from the legislative history, and from the requirements in Part H itself, that provision must be made by States for families to play an active role in the planning and provision of early intervention services. "

Preamble to notice of proposed rulemaking, 52 *Federal Register* 44352 (November 18, 1987).

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"The Secretary is committed to ensuring that the families of [eligible] children . . . are able to assume a full and active role in the provision of early intervention services to their children."

Part H regulations, Appendix A, 54 *Federal Register* 26338 (June 22, 1989).

Preface

Public Law 99-457, enacted in 1986, added to the Education of the Handicapped Act a new program (Part H of the Act) designed to encourage states to establish comprehensive, multidisciplinary systems of early intervention services for infants and toddlers with developmental delays and, at state option, those at risk of delay, and their families. States participating in the program were given four years to develop appropriate services for eligible children and their families. By the time they receive their fourth-year grant, states must establish procedural safeguards to protect the rights of families who are involved in early intervention systems. By the fifth year of their participation, states are to provide services to all eligible children and their families.

The Procedural Safeguards Task Force under the aegis of the National Early Childhood Technical Assistance System (NEC*TAS) to design models for these procedural safeguards and offer states guidance for complying with the legal mandates. Its members are:[1]

- Ira A. Burnim, Mental Health Law Project
- Kathleen Boundy, Center for Law and Education

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[1] Organizational affiliations are provided for identification purposes only. The agencies with which the task force members are affiliated have not necessarily reviewed or approved the recommendations in this report.

- Paula Goldberg, National Parent Network on Disabilities; NEC*TAS; PACER Center
- Sue Lehr, Center on Human Policy
- Heather Bennett McCabe, former Part H Administrator, Georgia Department of Human Resources; Rehabilitation and Education for Adults and Children, Inc.
- Patricia A. Place, National Association of State Directors of Special Education; NEC*TAS
- Mary Quigley-Rick, National Maternal and Child Health Resource Center
- Deborah A. Ziegler, Division for Early Childhood, Council for Exceptional Children.

The Task Force was formed in the fall of 1988. It held working sessions in February and September of 1989 to develop proposed policies. The policy recommendations reported here represent the members' consensus. The notes to the policies, which were prepared in late 1989 and early 1990, also are endorsed by the entire Task Force.

In order to fulfill its mission, the Task Force had to address fundamental questions about the role of parents in the Part H system.[2]

- Should parents be encouraged to choose whether and how their children and family will be served by the Part H system?
- To what extent should the Part H system respect parents' choices about whether and how their children and family should be served?
- To what information collected, maintained or used by the Part H system should parents have access?
- To what extent should parents control others' access to information about their child or family that is collected and maintained by the Part H system?
- What procedures should parents be afforded to redress their grievances?

The recommended policies represent our answers to these critical questions. They incorporate protections the Task Force believes *every* Part H system should adopt—both to comply with the federal mandate and to comport with its spirit of collaboration among parents and professionals.

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[2] The Part H regulations define a "parent" as "a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been [duly] appointed." [34 C.F.R. § 303.18.] The term does not include the state if the child is a ward of the state. *Id.*

The policies are presented in five chapters covering (1) consent to assessment, evaluation and services, (2) notice of parents' rights and of proposed actions, (3) right to review and correct records, (4) confidentiality of personally identifying information, and (5) administrative procedures for resolving parents' complaints. In the near future, the Task Force plans to issue recommendations for implementation of the surrogate parent provisions of Public Law 99-457.

Each of the five chapters is organized in the following manner for ease of reference. A narrative introduction describes the goals of the policies recommended in the chapter, the requirements imposed by federal law,[3] and how the recommended policies elaborate or expand upon these requirements. Immediately following each chapter's introduction are excerpts from Part H of the Education of the Handicapped Act (hereinafter "the Part H statute"), the Part H regulations, the regulations implementing Part B of the EHA (hereinafter "Part B regulations"), and the regulations implementing the Family Educational Rights and Privacy Act (hereinafter "FERPA regulations"). We urge readers to review this statutory and regulatory material before reading the recommended policies. Finally, the recommended policies themselves are presented with correspondingly numbered notes that include legal commentary.

Directly after this preface is a glossary of selected legal and programmatic terms that appear throughout the report and its footnotes. More detailed definitions of some of these terms are found in notes to the relevant policy recommendations and in the appendices that follow the text of the report. Appendix A includes information about the Task Force members. Appendix B gathers in a single document, without narrative or notes, all the recommended policies. The remaining appendices describe the legislative history of Part H (C) and reproduce the entire Part H statute (D), its implementing regulations (E), the relevant Part B regulations (F) and the FERPA regulations (G).

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[3] This report addresses only the federal legal requirements imposed by the U.S. Constitution, Part H of the Education of the Handicapped Act and the Part H regulations. In addition, certain other federal laws and regulations impose obligations on agencies and providers in the Part H system. Although not specifically aimed at regulating the activities of the Part H system, these legal schemes set standards for various federally assisted programs that are likely to serve families in the Part H system, such as Medicaid, child welfare programs and programs assisted through the Maternal and Child Health Services Block Grant and the Title XX Social Services Block Grant. The Task Force has not attempted to identify each of these legal schemes or the obligations they impose with respect to protecting the rights of families who apply for or receive services. Our understanding, however, is that these schemes provide few, if any, protections for families beyond those mandated in the Part H statute and regulations. Furthermore, this report does not address legal requirements concerning procedural safeguards that may be imposed by state law. However, states are obliged to comply with such requirements when they do not conflict with federal law. Most states have *some* state statutes, administrative regulations or judicial decisions that contain standards with which the Part H system must comply regarding parents' consent to assessment, evaluation, or services; notification to parents of their rights and of proposed actions; parents' rights to examine and correct records; confidentiality of personal identifying information; and the conduct of administrative hearings.

The Task Force welcomes comments and questions about its recommendations and legal interpretations. Comments and questions – including inquiries about work to date on surrogate parent policies – should be directed to Ira A. Burnim, Task Force chair, at the Mental Health Law Project, 2021 L Street N.W., Suite 800, Washington D.C. 20036; telephone (202) 467-5730; fax (202) 223-0409.

GLOSSARY

Following are some of the terms and acronyms that appear throughout this guide. For more comprehensive information about terms related to early intervention, see the definitions in the Part H, Part B and FERPA regulations (Appendices E, F and G).

Case management

Activities designed to assist and enable a recipient (under Part H, an eligible child and the child's family) to receive the rights, safeguards and services to which he or she is entitled (see the full definition in the Part H regulations, 34 C.F.R. § 303.6).

C.F.R.

The Code of Federal Regulations, which contains the rules promulgated by the various federal agencies. The regulations cited here all appear in volume 34, (cited as 34 C.F.R). Part 303 of 34 C.F.R. contains the Part H regulations (cited as 34 C.F.R. § 303); Part 300, the Part B regulations (cited as 34 C.F.R. § 300); and Part 99, the FERPA regulations (cited as 34 C.F.R. § 99).

EHA

Education of the Handicapped Act, the federal special education law formerly called the Education for All Handicapped Children Act, amended in 1986 by Public Law 99-457 to, among other things, authorize funds for states to develop comprehensive early intervention systems.

Evaluation and assessment

"Evaluation" means the procedures used to determine whether a child is eligible for services under the state's definition. "Assessment" means the procedures used to identify the eligible child's needs, the family's strengths and needs related to the child's development, and the services to meet these needs (see the full definition in the Part H regulations, 34 C.F.R. § 303.322).

FERPA

The Family Educational Rights and Privacy Act, a federal statute that requires federally supported educational programs to give parents and students access to students' records and the ability to correct records they believe are inaccurate, and prohibits the broad release of student records without parents' or students' consent.

ICC

The Interagency Coordinating Council that each state and jurisdiction participating in Part H must establish to assure coordination and cooperation of all participating agencies in implementing the early intervention program.

Id.

Id. is used in footnotes to refer to the citation in the previous footnote.

IEP

The written Individualized Education Program that school systems must develop, with parents' participation, to meet the educational needs of each child identified as requiring special education and related services.

IFSP

The written Individualized Family Service Plan that the early intervention system must develop, with family participation, for how it plans to meet the assessed needs of each child identified as eligible for early intervention services and of the child's family.

Lead agency

The agency named by the Governor to administer a state's interagency early intervention system, with advice and assistance by the Interagency Coordinating Council.

"Part"

A section of a law (e.g., Part H, Part B) or a regulation (e.g., Part 303 of 34 C.F.R., which includes all of the Part H regulations).

Part B

The section of the Education of the Handicapped Act providing for a free appropriate public education and education-related services to all school-age children with handicapping conditions (ages 3-21 in most states; beginning at birth in some). Originally enacted in 1975 as Public Law 94-142, the Education for All Handicapped Children Act.

Part H

Part H of the Education of the Handicapped Act, enacted by Public Law 99-457. It establishes the early intervention program for eligible infants and toddlers up to age 3.

Procedural safeguards

Legal protections (including mechanisms or procedures) available to children, their parents and their advocates to protect their rights in dealings with agencies and providers of early intervention services (see Section 680 of the Education of the Handicapped Act, codified at 23 U.S.C. § 1480 *et seq.*).

PL 99-457

The public law number of the Education of the Handicapped Act Amendments of 1986, enacted by the 99th Congress. Title I of PL 99-457 established the Part H program.

§ and §§

Section(s) of a federal statute or regulations.

U.S.C.

United States Code, containing the bills passed by Congress and signed into law by the President. The Education of the Handicapped Act is published ("codified") in volume 20 and cited as 20 U.S.C. § 1400 *et seq* (Section 1400 and numbers following). In this report, citations to Part H in footnotes are to the U.S. Code. The section numbers in the codification are different than the section numbers in the EHA itself. The copy of Part H of the EHA in Appendix D indicates which U.S.C. section corresponds to each section of the EHA.

Chapter 1

Consent to Assessment, Evaluation and Services

INTRODUCTION

The recommended policies governing consent to assessment, evaluation and services are designed to ensure that:

- The participation of families in the Part H system is voluntary;
- Parents receive the information they need to make informed decisions about how their children and family will be served; and
- States respect parents' wishes about how their children and family will be served.

The Part H statute and regulations contain three principal safeguards aimed at preventing coerced participation in Part H programs and promoting collaborative decision-making among parents and professionals. Under the statute and regulations:

- Parents' written consent must be obtained before the initial evaluation and assessment of a child or family is conducted and before early intervention services are initiated;
- The consent given by parents must be informed; and
- Parents must receive written notice of any proposed change in the "identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family."[1] Once they receive such notice, parents may prevent a proposed change by filing a complaint and re-

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[1] 34 C.F.R. § 303.403(a).

questing a formal hearing. (Unless the state and parents agree otherwise, the Part H system may not make a proposed change while the parents' complaint is being resolved.)

Although these are important protections, we believe they do not go far enough. Additional safeguards are needed to assure parents a meaningful and effective voice in decisions about their child and family. Therefore, the policies recommended by the Task Force prescribe, in addition, that:

- Parents must receive detailed information about assessments, evaluations and services for which their consent is sought;
- Parents should be asked to sign the Individualized Family Service Plan as evidence of their consent to the provision of the services outlined in the plan;
- Unless the parents have waived this right, the Part H system must obtain parents' written consent before making any change in the identification, evaluation or placement of their child or in the provision of appropriate early intervention services to their child or family;
- Parents have a right to selectively consent to proposed education and assessment procedures and proposed services (i.e., the parents may consent to some procedures or services and reject others).

The recommended policies authorize states to pursue activities that will encourage parents to reconsider a refusal to consent. Such activities might include providing relevant literature or other materials, offering peer counseling to enhance parents' understanding of the value of early intervention and to allay their concerns about participation in Part H programs, and periodically renewing contact with parents to see if they have changed their minds about the desirability of the proposed procedures or services.

The recommended policies, however, also set limits on the action states may take in response to parents' refusal to consent. We reject the use of coercion to obtain consent to evaluation and assessment procedures or to services unless the parents' refusal to consent amounts to child abuse or child neglect under state law. When the state believes a refusal amounts to abuse or neglect, it may initiate a proceeding in a proper court to override the parents' refusal. This may be done only as a last resort, in an emergency and after all other avenues have been tried and failed.

In addition, the recommended policies prohibit the state from using administrative processes, including administrative hearings for resolving complaints, to override the parents' refusal to consent. Although a note in the Part H regulations suggests that a state's Part H system may use Part B due process procedures to override a refusal to consent to the evaluation of a child, we believe that neither the Education of the Handicapped Act (hereinafter "the EHA") nor the Part B regulations authorize use of Part B due process procedures for this purpose. In our view, the Part B procedures apply to children of compulsory school age, not to infants and toddlers in the family setting. Even if authorized by the EHA and its implementing regulations, the use of Part B procedures to obtain an evaluation without the parents' consent would, we believe, violate constitutional limitations on state intervention in family life.

Finally, the use of the term "parents" requires clarification. Although the recommended policies make reference to the parents' consent, they require that only one parent sign the Individualized Family Service Plan. This is consistent with current practice in the Part B program, where only one parent generally signs the Individualized Education Program. It is also consistent with practice in the health and human services fields, in which the consent of one parent is considered legally sufficient to authorize services to a child.

KEY PROVISIONS OF FEDERAL LAW AND REGULATIONS

Part H Statute

Section 677(c). [also cited as 20 U.S.C. § 1477] . . .With the parent's consent, early intervention services may commence prior to the completion of [the multidisciplinary] assessment."

Section 680. [also cited as 20 U.S.C. § 1480] The procedural safeguards required to be included in a statewide system...shall provide, at a minimum, the following:

(5) Written prior notice to the parents or guardian of the handicapped infant or toddler whenever the state agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, or placement, or the provision of appropriate early intervention services to the handicapped infant or toddler.

(7) During the pendency of any proceeding or action involving a complaint, unless the state agency and the parents or guardian otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided or if applying for initial services shall receive the services not in dispute.

Part H Regulations

§ 303.322 Evaluation and assessment.

(d) Family assessment.
  (1) Family assessments under this part must be designed to determine the strengths and needs of the family related to enhancing the development of the child.
  (2) Any assessment that is conducted must be voluntary on the part of the family.

§ 303.401 Definitions of consent, native language, and personally identifiable information.

(a) "Consent" means that –
  (1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;
  (2) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
  (3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time;...

§ 303.403 Prior notice; native language.

(a) General. Written prior notice must be given to the parents of a child eligible under this part a reasonable time before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family.

(b) Content of notice. The notice must be in sufficient detail to inform the parents about –
  (1) The action that is being proposed or refused;
  (2) The reasons for taking the action; and
  (3) All procedural safeguards that are available under this part.

§ 303.404 Parental consent.

(a) Written parental consent must be obtained before –
  (1) Conducting the initial evaluation and assessment of a child...and
  (2) Initiating the provision of early intervention services for the first time (i.e., at the time that the initial IFSP is developed).

(b) If consent is not given, the public agency shall make reasonable efforts to ensure that the parent –
  (1) Is fully aware of the nature of the evaluation and assessment or the services that would be available; and

Part H Regulations (continued)

(2) Understands that the child will not be able to receive the evaluation and assessment or services unless consent is given.

. . .

Note 2: The Part B regulations contain procedures to enable public agencies to initiate a due process hearing or use other procedures to override a parent's refusal to consent to the initial evaluation of the parent's child. Those procedures apply to eligible children under this part, since the Part B evaluation requirements applies to all handicapped children in a State, including infants and toddlers.

§ 303.425 Status of a child during proceedings.

(a) During the pendency of any proceeding involving a complaint under the subpart, unless the public agency and parents of a child otherwise agree, the child must continue to receive the appropriate early intervention services currently being provided.

(b) If the complaint involves an application for initial services under this part, the child must receive those services that are not in dispute.

POLICY RECOMMENDATIONS

Definition of "Informed Consent"

RECOMMENDED POLICIES

1. Parental consent is "informed" when:

a. The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;

b. The parent understands and agrees in writing to the carrying out of the activity for which parental consent is sought, and the consent describes that activity and lists records (if any), including physical documents and recorded information, that will be released and to whom; and

c. The parent understands that the granting of consent is voluntary and may be revoked at any time.

NOTES

1-1 This is the same as the definition of "consent" in the Part H regulations, with the exception of a clause in subparagraph (b) clarifying the term "records."[2] We use "informed consent" instead of simply "consent" to stress that the parent's consent is legally effective only if the parent understands to what he or she is consenting. Under the Part H regulations, obtaining a parent's consent involves more than securing the parent's signature on a standard form. An agency or provider must *fully* inform the parent of *all* information relevant to the activity for which consent is sought.[3]

1-2 The clause "including physical documents and recorded information" in (b) does not appear in the definition of "consent" in the Part H regulations. We added this clause to clarify that, under the Part H regulations, the term "record" includes not only a physical document in which information is recorded but also the recorded information itself.[4] Thus, under the Part H regulations, as well as under policy #1, the written consent that a parent is asked to sign must list both type of records.[5] And, of course, the agency or provider seeking the consent must ensure that the parent understands the nature of the records, that they will be released, and to whom.[6]

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[2] *See* 34 C.F.R. § 303.401(a) (definition of consent).

[3] 34 C.F.R. § 303.401(a)(1).

[4] *See* 34 C.F.R. §§ 303.402 & 303.460(b)(2) (adopting Part B policies and procedures regarding access to and disclosure of Part H records); 34 C.F.R. § 300.560 (under Part B, "records" means "the type of records covered under the definition of 'education records' in [the FERPA regulations]"); 34 C.F.R. § 99.3 (under FERPA regulations, a "record" means "any *information* recorded in any way")(emphasis added).

[5] 34 C.F.R. § 303.401(a)(2) (parent's consent must be reflected in a "writing" that "lists" records that will be released and to whom).

[6] 34 C.F.R. § 303.401(a)(1)&(2) (consent is present only when parent "understands ... the carrying out of the activity for which consent is sought").

When Consent to an Evaluation or Assessment Is "Informed"

RECOMMENDED POLICIES

2. A parent's consent to an evaluation or assessment is "informed" if:

a. The parent understands the purpose of the evaluation or assessment and the procedures to be employed (i.e., what information is desired, why it is desired and how it will be obtained). If a family assessment is to be conducted, this must be made explicit. The parent's written consent should describe the assessment or evaluation procedures the parent has authorized;

b. The parent understands any burdens a parent or family will bear as a result of the assessment or evaluation (e.g., whether parents must provide transportation, possible impact on the family of home-based procedures, effects on insurance limits); and

c. The parent understands the possible adverse consequences of refusing to consent to an assessment or evaluation or to proposed assessment or evaluation procedures (e.g., inability to establish child's eligibility for Part H services).

NOTES

2-1 The Part H regulations require the Part H system to obtain parents' consent to the initial evaluation and assessment of a child.[7] They further require that parents be "fully informed of all information relevant to" the proposed evaluation and assessment when their consent is sought.[8] To fulfill this legal obligation, the Part H system must, in our view, provide parents all the information outlined in policy #2.

2-2 We recommend in policy #6 below that Part H systems obtain parents' consent not only to the initial evaluation of a child but also, unless parents waive this right, to all subsequent evaluations. The Part H rules do not impose such a requirement but oblige the system only to notify parents of subsequent evaluations it proposes to undertake.[9] This notice must "be in sufficient detail to inform the parents about ... [t]he action that is being proposed."[10] We believe such a notice should give parents all the information outlined in policy #2(a-c).

2-3 The Part H rules direct that a family assessment be "based on information provided by the family through a personal interview; and ... [i]ncorporate the family's description of its strengths and needs related to enhancing the child's development."[11]

2-4 Neither the Part H statute nor the Part H regulations specifically address the use in the evaluation and assessment process of procedures , such as observation by professionals, of which the family is unaware at

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7. 34 C.F.R. §§ 303.404(a).
8. 34 C.F.R. § 303.401(a)(1).
9. 34 C.F.R. § 303.403(a).
10. 34 C.F.R. § 303.403(b)(1).
11. 34 C.F.R. § 303.322(d)(3)(ii) & (iii).

When Consent to Evaluation or Assessment Is "Informed" (continued)

NOTES

2-4 (continued)
the time of their use. We question the propriety of using such undisclosed procedures to assess parent-child interactions or the family as a whole.[12]

If such procedures are used, they must be attended by all of the procedural safeguards the law imposes on the use of evaluation and assessment procedures generally. Accordingly, a Part H agency or provider may not use such procedures as part of the initial evaluation or assessment of a child, or as part of a family assessment, without the parents' prior informed consent.[13] Likewise, an agency or provider must inform the parents if such procedures are to be part of an evaluation of a child conducted after the initial evaluation.[14]

2-5 Policy #2(b) does not mention financial charges imposed on the parent because Part H evaluations and assessments must be conducted at no cost to the parents.[15]

2-6 Policy #2(c) is consistent with the requirement that, if parents refuse consent to an initial evaluation and assessment, they must be made "fully aware of the nature of the evaluation and assessment ... that would be available."[16]

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[12] *See* 34 C.F.R. § 303.322(d)(3) (family assessments must "be based on information provided by the family through a personal interview" and "[i]ncorporate the family's description of its strengths and needs").

[13] 34 C.F.R. § 303.404(a)(1) (parents' consent required before evaluation and assessment of child); 34 C.F.R. § 303.322(d)(2) (parents' consent required before family assessment is conducted); 34 C.F.R. § 303.401(a)(1) (parents must be "fully informed of the activity to which consent is sought").

[14] 34 C.F.R. § 303.403(a) (parents entitled to prior notice before an agency or provider conducts an evaluation subsequent to the initial evaluation); 34 C.F.R. § 303.403(b)(1) (the notice must "be in sufficient detail to inform the parents about ... [t]he action that is being proposed"). *See also Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973) (school system's administration to students, without informed parental consent, of questionnaire designed to identify potential student drug abusers violates parents' constitutional right of privacy).

[15] 34 C.F.R. § 303.521(b)(2).

[16] 34 C.F.R. § 303.404(b)(1).

When Consent to Services Is "Informed"

RECOMMENDED POLICIES

3. A parent's consent to the provision of services is "informed" if:

a. The parent understands the purpose of each service to be provided and how the service will be provided. The parent's written consent should indicate each service the parent has authorized;

b. The parent understands the financial charges (if any) that parents or family will incur for the services. The parent's written consent should indicate each charge the parent has authorized;

c. The parent understands any burdens that parents or family will bear as a result of each proposed service (e.g., whether parents must provide transportation, possible impact on the family of home-based services, possible effects on insurance limits); and

d. The parent understands the possible adverse consequences of refusing proposed services (e.g., worsening of the child's condition).

NOTES

3-1 The Part H regulations require the Part H system to obtain parents' consent to the initial provision of services.[17] They further require that parents be "fully informed of all information relevant to" the proposed services when their consent is sought.[18] To fulfill this legal obligation, the Part H system must, in our opinion, provide parents all the information outlined in policy #3.

3-2 We recommend in policy #6 below that states obtain parents' consent not only to the initial provision of services but also to all subsequent changes in services, unless parents waive this right. The Part H regulations do not impose such a requirement but obligate the Part H system only to notify parents of changes in services it proposes to implement.[19] This notice must "be in sufficient detail to inform the parents about ... [t]he action that is being proposed."[20] Such a notice should, in our view, provide parents with all the information outlined in policy #3(a-d).

3-3 Policy # 3(d) is consistent with the regulatory requirement that, if parents refuse to consent to the provision of services, they must be made "fully aware of the nature of the ... services that would be available."[21]

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[17] 34 C.F.R. § 303.404(a)(2).
[18] 34 C.F.R. § 303.401(a)(1).
[19] 34 C.F.R. § 303.403(a).
[20] 34 C.F.R. § 303.403(b)(1).
[21] 34 C.F.R. § 303.404(b)(1).

Obtaining Parents' Signature on the IFSP

RECOMMENDED POLICIES

4. Parents should be asked to sign the Individualized Family Service Plan ("IFSP") as evidence of their informed consent to the provision of the services outlined in the plan. The IFSP form should allow the parents to indicate consent for some or all of the proposed services. A refusal to sign the IFSP should be treated as a refusal to consent to the services outlined in the plan.

NOTES

4-1 The Part H regulations require that parents consent in writing to the initial provision of services (e.g., at the time the initial IFSP is developed).[22] They do not, however, mandate that parents sign either the initial IFSP itself or any subsequent or revised plans. However, the Task Force recommends that states adopt policies directing that parents be asked to sign the initial IFSP and all subsequent plans.

A similar procedure is generally followed in the state administration of Part B programs. When an initial or revised Individualized Education Program ("IEP") is developed, parents are generally asked to sign the plan to evidence their consent. Parents and administrators have found that this system works well and protects both the parents' and the state's interests in assuring there is consent to services provided.

4-2 As indicated in the notes to recommended policy #7, we believe parents have a right to consent to some proposed services and reject others. Accordingly, we recommend that the IFSP form allow parents to indicate consent for some or all of the proposed services.

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[22] 34 C.F.R. § 303.404(a)(2).

Obtaining Informed Consent Before Initial Evaluation and Assessment of a Child, a Family Assessment, and the Initial Provision of Services

RECOMMENDED POLICIES

5. Parents' informed consent must be obtained before:

a. conducting the initial evaluation and assessment of a child; and

b. conducting a family assessment; and

c. initiating the provision of services to a child or family (i.e., at the time the initial Individualized Family Service Plan is developed).

NOTES

5-1 Both the Part H regulations and policy #5 speak only of the "parents'" consent. However, other adult family members may be part of a family assessment or may receive services, and obtaining their prior consent will generally be a practical necessity. We also believe such consent should be obtained as a matter of policy.

5-2 The Part H regulations explicitly require parents' informed consent before the Part H system conducts an initial evaluation and assessment of the child and before it initiates the provision of services to a child or family.[23] Implicitly, they require informed consent before a family assessment by mandating that family assessments "be voluntary on the part of the family."[24]

5-3 We read the phrase "initial evaluation and assessment" as including all evaluation and assessment activity up to the parents' approval of the initial IFSP.[25] In our view, the "initial" eligibility decision is not finally made until the Part H system commits in the initial IFSP to provide services to a child and the child's family. Likewise, the "initial" assessment is not completed until the Part H system and the parents have agreed on the services that will be included in the first IFSP.

5-4 The Part H regulations contain a note suggesting that the state may employ Part B due process procedures to secure an evaluation of a child without parental consent. The note states: "The Part B regulations con-

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[23] 34 C.F.R. § 303.404(a).

[24] 34 C.F.R. § 303.322(d)(2).

[25] *See* 34 C.F.R. § 303.404(a)(1) (consent required before initial evaluation and assessment of child under § 303.322); 34 C.F.R. § 303.322(b) ("evaluation" is process of determining the initial and continuing eligibility of a child for Part H services; "assessment" is the process of identifying the services the child and family require).

Obtaining Consent Before Initial Evaluation, Assessment and Services (continued)

NOTES

5-4 (continued)

tain procedures to enable public agencies to initiate a due process hearing or use other procedures to override a parent's refusal to consent to the initial evaluation of the parent's child. Those procedures apply to eligible children under [Part H], since the Part B evaluation requirements applies [sic] to all handicapped children in a State, including infants and toddlers."[26]

In our opinion, neither the Education of the Handicapped Act nor the Part B regulations authorize the use of Part B due process procedures to override a refusal to consent to the evaluation of an infant or toddler. The Part B procedures that permit the override of the parents' refusal to consent were designed with children of compulsory school age in mind, not infants and toddlers in the family setting. We believe the use of Part B procedures to obtain an evaluation without parental consent, even if authorized by the EHA and its implementing regulations, would violate constitutional limitations on state intervention in family life.[27] As indicated in the notes to policy #9 below, we believe that a state may constitutionally override parents' refusal to consent to an evaluation or to services (a) only when the refusal amounts to child abuse or neglect under state law and (b) only through a judicial, not an administrative, proceeding.

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[26] 34 C.F.R. § Section 303.404, Note 2. (The relevant Part B regulations are at 34 C.F.R. § 300.504(c).)

[27] *See generally* Note, "Developments in the Law – The Constitution and the Family," 93 *Harvard Law Review* 1157 (1980).

Obtaining Informed Consent Before Subsequent Evaluations and Before Changes in Identification, Services and Placement

RECOMMENDED POLICIES

6. Unless parents have explicitly waived the requirement, their informed consent should also be obtained before:

a. conducting an evaluation subsequent to the initial evaluation; or

b. changing the identification or the placement of a child or the services provided a child or family.

NOTES

6-1 The Part H regulations do not require the Part H system to obtain parents' consent before undertaking the actions listed in policy #6. Instead, they require the Part H system only to provide notice to parents of its intent to undertake any such action.[28] We believe parents should be entitled to more than mere notice. Their express consent should be obtained before an evaluation subsequent to the initial evaluation is conducted and before a change is made in the identification or placement of a child or in the services to the child or family, unless the parents have waived the right. (We recognize that many parents may not want to be burdened with signing a written consent whenever a new evaluation or a change in service is proposed.)

This policy could be implemented as follows: Before parents sign the initial IFSP, they would be asked whether they want their consent to be obtained before the actions listed in recommended policy #6 are undertaken. If parents indicate they want their consent obtained before one or more of these actions are undertaken, their wishes would be respected. Parents who indicate they do not want their consent obtained would be asked to sign a waiver to this effect. (Parents' consent to the waiver must, of course, be "informed.") Parents who sign such a waiver would receive prior notice of such actions, as required by the Part H regulations,[29] but the Part H system would not be required to obtain their express prior consent. Waivers would be revocable at any time[30] and parents should

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[28] 34 C.F.R. § 303.403(a).

[29] 34 C.F.R. § 303.403(a)

[30] *See* 34 C.F.R. § 303. 401(a)(3) (consent of a parent "may be revoked at any time")

Obtaining Consent Before Changes in Identification and Services (continued)

NOTES

6-1 (continued)
periodically be given the opportunity to review their decision about a waiver.

6-2 We believe the approach recommended above is consistent with the mandate that revisions to the Individualized Family Service Plan be made "jointlyby the family" and the state.[31]

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[31] 34 C.F.R. § 303.340(b)(1) (emphasis added).

Permitting Parents to Consent to Some Procedures and Services While Rejecting Others

RECOMMENDED POLICIES

7. The state may not refuse to perform an evaluation or assessment procedure or deny a service because the parents have refused to consent to another procedure or service they do not desire.

a. Parents may selectively consent to proposed procedures for evaluating their child or assessing their child or family (i.e., the parents may consent to some procedures and reject others).

b. When the services recommended for a child or family are more comprehensive than desired by the parents, the parents may consent to some services and reject others.

NOTES

7-1 Neither the Part H statute nor the Part H regulations directly address whether parents should be permitted to selectively consent to proposed evaluation and assessment procedures and to proposed services (i.e., to pick and choose among the procedures and services recommended). However, the Task Force considers it the intent of the Congress that parents have such a right. Congress made clear that Part H should be a voluntary program that supports families, and it mandated that Individualized Family Service Plans be fashioned collaboratively with parents. In our view, it would be inconsistent with this family-centered approach for a state to deny parents the right to accept some recommended procedures or services and to reject others. We do not believe Congress meant states to adopt a take-it-or-leave-it stance toward parents regarding state-recommended procedures or services.

7-2 We recognize that parents' refusal to consent to proposed evaluation procedures may yield insufficient information for the determination of eligibility. In addition, parents' refusal to consent to recommended services may in some cases limit the benefits a child or family receives from the Part H program. Parents should be informed of these possible outcomes when their consent is sought. However, if, after being so informed, parents continue to withhold consent, their refusal should be respected and only the procedures or services to which they have consented should be provided.

Many parents, we expect, will eventually consent to procedures and services they have earlier refused, particularly if their initial experiences with the Part H system are positive, demonstrating respect for their autonomy and preferences.

Selective Consent to Procedures and Services (continued)

NOTES

7-3 Policy #7 is consistent with the mandate in the Part H regulations that, when there is a dispute between the parent and the state, "the child must receive those services not in dispute."[32] The term "services," in the context of the above-quoted regulation, includes evaluation and assessment procedures.[33]

7-4 In our view, a state could lawfully withhold a recommended evaluation or assessment procedure that is desired by parents if the procedure would have no validity without another procedure that has been refused by the parents. Similarly, a state could lawfully withhold a service that is desired by parents if that service is part of a broader program of services that has been refused by the parents and the desired service would be ineffective without the refused services. Realistically, however, we doubt that such situations will arise.

7-5 Policy #7 does not apply to certain case management services that a parent may not refuse, such as service coordination activities. The Part H statute requires the appointment of a case manager "who will be responsible for the implementation of the [IFSP]."[34] This is an administrative requirement imposed by federal law that parents can neither waive nor "refuse."

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[32] 34 C.F.R. § 303.425(b).

[33] 34 C.F.R. § 303.12.

[34] 20 U.S.C. § 1477(d)(6).

Encouraging Parents' Consent to Recommended Assessment and Evaluation Procedures and to Recommended Services

RECOMMENDED POLICIES

8. The state may pursue activities designed to encourage parents to consent to recommended assessment or evaluation procedures and to recommended services that they have refused.

a. These activities may include:

1) providing to parents relevant literature or other materials;

2) offering parents peer counseling to enhance their understanding of the value of early intervention and to allay their concerns about participation in Part H programs; and

3) periodically renewing contact with parents, on an established time schedule, to determine if they have changed their minds about the desirability of recommended procedures or services.

b. The state may not employ any form of coercion in attempting to persuade parents to accept recommended evaluation or assessment procedures or recommended services, except as permitted in policy #9 below.

NOTES

8-1 Neither the Part H statute nor the Part H regulations specifically address whether Part H agencies and providers may attempt to persuade parents to consent to evaluation and assessment procedures and to services that the parents have refused. We believe it is permissible, and probably advisable, for states to adopt policies permitting agencies and providers to engage in such conduct. However, states should closely monitor such conduct to ensure that parents are not excessively pressured to accept unwanted procedures or services.

8-2 Activity designed to encourage parents to reconsider a refusal to consent to a child's evaluation would promote the goal of the "child find" provisions of the Part H regulations, namely, "to ensure that ... [a]ll infants and toddlers in the State who are eligible for services ... are identified ... and evaluated."[35] It is also consistent with the Part H system's duty, when consent is withheld, to make reasonable efforts to ensure that parents are "fully aware of the nature of the evaluation and assessment or the services that would be available."[36]

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[35] 34 C.F.R. § 303.321(b)(1).

[36] 34 C.F.R. § 303.404(b)(1).

Overriding Parents' Refusal to Consent

RECOMMENDED POLICIES

9. There may be circumstances when the parents' refusal to consent to an evaluation or assessment procedure or to a service would amount to child abuse or child neglect under state law. In such circumstances, and onlyin such circumstances, the state may initiate a proceeding in a proper court to override the parents' refusal to consent. In such a proceeding, the state may seek either judicial appointment of a guardian empowered to consent on behalf of the child to the recommended procedures or services or, alternatively, state custody of the child, so that the state may consent on the child's behalf to recommended procedures or services. The first of these options is less intrusive on the parent's rights; accordingly, it is the preferred alternative.

a. A judicial proceeding should be initiated only in an emergency, as a last resort, and after all other avenues (including peer counseling) have been tried and have failed.

b. Neither the state nor a provider nor anyone else may use an administrative procedure, including the administrative complaint resolution procedure within the Part B and Part H programs, to compel parental conduct contrary to parents' wishes.

NOTES

9-1 As indicated in the notes to policy #5 above, the Task Force believes that a state may constitutionally override the parents' refusal to consent to an evaluation or to services only when the parents' refusal amounts to child abuse or neglect under state law.[37] In addition, we believe that only a judicial process, as opposed to an administrative one, may be used to achieve such an end.[38]

9-2 In our view, states should be sensitive to the reality that, with the passage of time, many parents will reconsider refusals of their consent to evaluation and assessment procedures and to services, especially if they have had positive contact with the Part H system since their consent was first sought. The early intervention system ought not to force itself on families unless absolutely necessary to avoid serious abuse or neglect. The system should be careful not to acquire a reputation as insensitive or as seeking to remove children from their parents or otherwise restricting parental rights.

9-3 We recognize that legal risks are associated with not providing proposed procedures and services (e.g., a suit based on the state's failure to protect a child from harm or its failure to fully inform a parent about the risks of refusing a service). However, we do not believe such risks can justify coercion beyond that permitted in policy #9. States may wish to obtain parents' signatures, when possible, to document that a particular procedure or service has been offered and declined.

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[37] *See generally* Note, "Developments in the Law – The Constitution and the Family," 93 *Harvard Law Review* 1157 (1980).

[38] *Id.*

Chapter 2

Notice of Parents' Rights and of Proposed Actions

INTRODUCTION

The recommended policies governing notice to parents of their rights and of proposed actions are designed to ensure that:

- Parents are informed of and understand their rights under the Part H program;
- Parents are notified of significant actions an agency or provider proposes to take that will affect their child or family; and
- Parents are provided, in a comprehensible manner, the information they need to make informed decisions whether to consent to proposed actions.

The Part H statute and regulations lack a comprehensive approach to ensuring that parents who inquire about or avail themselves of Part H services are informed of and understand their rights. Instead, the statute and regulations contain a patchwork of provisions directing the Part H system to notify parents of particular rights in particular circumstances. These require that:

- When parents' consent to a particular activity is sought, the parents must be "fully informed of all information relevant to the activity,"[1] including information about their rights;

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[1] 34 C.F.R. § 303.401(a)(1).

- Written notices of proposed action must inform parents of "[a]ll procedural safeguards that are available under [the Part H regulations]";[2] and
- The state must notify parents generally, by publication and otherwise, of certain practices concerning the collection, maintenance and use of confidential information and of their rights under the Family Educational Rights and Privacy Act (FERPA).

In our view, the lack of a comprehensive scheme for informing parents of their rights is a serious deficiency. Parents cannot be effective advocates for their children and their families unless they know and understand their rights. And without such knowledge, they will be unable to play the central role in the design and delivery of Part H services envisioned for them by Congress. Accordingly, we strongly believe states should adopt policies to ensure that parents are informed of and understand all their rights. Such policies should mandate that:

- Parents must be informed of their rights at multiple points in their family's involvement with the Part H system, including when the initial contact with the system is made, when the initial evaluation and assessment is proposed, when the eligibility determination is made, and when the Individualized Family Service Plan is being developed or reviewed;
- Information about rights must be provided both orally and in writing;
- Oral notice must be provided in the natural flow of conversation and in the context of emphasizing parental freedom and choice in the Part H system; and
- Information about parents' rights must be included in the state's public awareness program.

Although not systematic in their approach to informing parents of their rights, the Part H statute and regulations do create a basic framework for ensuring that parents receive adequate notice of proposed actions:

- Parents must receive timely notice in writing "before a public agency or a service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of their child, or the provision of early intervention services to the child or family;"
- The notice must be in sufficient detail to inform parents about the action that is being proposed (including a proposed refusal

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[2] 34 C.F.R. § 303.403(b)(3).

to act), the reasons for taking the action and all procedural safeguards available under the regulations; and

- The notice must also be in language understandable to the parents, including in their native language (unless this is clearly not feasible) or other mode of communication normally used by the parent.

Although these safeguards are critical, they do not, in our view, assure that parents will have the information they need to make an informed decision about whether to accept or contest a proposed action. We believe that, in addition to the information required by the statute and regulations, notices of proposed actions (including proposed refusals to act) should give parents:

- A description of any alternatives to the proposed action considered by the agency or provider and the reasons why those options were rejected;
- A description of each record or report used as a basis for the proposed action;
- If applicable, an explanation of parents' right to refuse to consent to the action, including any consequences for the parent or child if the parents exercise this right; and
- If applicable, a description of (a) the method for appealing the proposed action, (b) whether activities to which the parents object will be delayed pending the appeal, and (c) whether activities sought by the parents will be implemented pending the appeal.

KEY PROVISIONS OF FEDERAL LAW AND REGULATIONS

Part H Statute

Section 680. [also cited as 20 U.S.C. § 1480] The procedural safeguards required to be included in a statewide system...shall provide, at a minimum, the following:

(5) Written prior notice to the parents or guardian of the handicapped infant or toddler whenever the state agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, or placement, or the provision of appropriate early intervention services to the handicapped infant or toddler.

(6) Procedures designed to assure that the notice required by paragraph (5) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section [including the timely administrative resolution of complaints, the right to confidentiality of personal information, and the right to examine records].

Part H Regulations

§ 303.401 Definitions of consent, native language, andpersonality identifiable information.

(b) "Native language," when used with reference to persons of limited English proficiency, means the language or mode of communication normally used by the parent of a child eligible under this part;...

§ 303.403 Prior notice; native language.

(a) General. Written prior notice must be given to the parents of a child eligible under this part a reasonable time before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family.

(b) Content of notice. The notice must be in sufficient detail to inform the parents about –

(1) The action that is being proposed or refused:

(2) The reasons for taking the action; and

(3) All procedural safeguards that are available under this part.

(c) Native language.

(1) The notice must be –

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parents, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency, or designated service provider, shall take steps to ensure that –

(i) The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

(ii) The parent understands the notice; and

(iii) There is written evidence that the requirements of this paragraph have been met.

(3) If a parent is deaf or blind, or has no written language, the mode of communication must be that normally used by the parent (such as sign language, braille, or oral communication).

§ 303.460. Confidentiality of information.

(a) Each State shall adopt or develop policies and procedures ...

(b) ... [that] meet the requirements in 34 CFR 300.560 through 300.576, with the following modifications:

(1) Any reference to the "State educational agency" means the lead agency under this part.

. . .

Part H Regulations (continued)

(4) Any reference to 34 CFR 300.128 [Part B child find] means §§ 303.164 and 303.321 [Part H child find].

Part B Regulations

§ 300.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under §300.128 of Subpart B [child find], including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

POLICY RECOMMENDATIONS

Rights of Which Parents Should Be Notified

RECOMMENDED POLICIES

10. Parents should be informed that they have the following rights:

a. the right to a timely, multidisciplinary assessment;

b. the right, if eligible, to appropriate early intervention services for their child and family;

c. the right to refuse evaluations, assessments and services;

d. the right to notice before a change is made or refused in the identification, evaluation or placement of the child, or in the provision of services to the child or family;

e. the right to confidentiality of personally identifiable information;

f. the right to review and correct records;

g. the right to be invited to and to attend and participate in all meetings in which a decision is expected to be made regarding a proposal to change the identification, evaluation or placement of the child or the provision of services to the child or family;

NOTES

10-1 As explained below, the rights listed in policy #10, except in subparagraph (g), are in our view legally mandated.

a. The right in subparagraph (a) to a timely, multidisciplinary evaluation is mandated by 20 U.S.C. § 1477(a)&(c) and 34 C.F.R. § 303.322(a)&(e);

b. The right in subparagraph (b) to services for eligible children and their families is stated in 20 U.S.C. § 1476(b)(2-4) and 34 C.F.R. § 303.302;

c. The right in subparagraph (c) to refuse evaluations, assessments and services is implicit in the Part H statute and regulations.[3] In addition, as indicated in the notes to policy #5, we believe parents have a constitutional right to refuse evaluations, assessments and services, except in the limited circumstance where the parents' refusal amounts to child abuse or neglect under state law;

d. The right in subparagraph (d) to notice of proposed actions is mandated by 20 U.S.C. § 1480(5) and 34 C.F.R. § 303.403(a);

e. The right in subparagraph (e) to confidentiality of personally identifiable information is mandated by 20 U.S.C. § 1480(2) and 34 C.F.R. § 303.460;

f. The right in subparagraph (f) to review and correct records is mandated by 20 U.S.C. § 1480(3) and 34 C.F.R. § 303.402;

g. We do not believe that parents must

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[3] *See* 20 U.S.C. § 1476(b)(2) (early intervention services to be "available" to eligible children and their families); 34 C.F.R. § 303.404(a) (parents' consent required before the initial evaluation and assessment of a child and the initial provision of services); 34 C.F.R. § 303.322(d)(2) (family assessment is voluntary on the part of the family); 34 C.F.R. § 303.340(b)(1) (IFSP must be developed jointly by the family and the state); note 1 to 34 C.F.R. § 303.344 ("[p]arents retain the ultimate decision in determining whether they, their child, or other family members will accept or decline services"); *cf.* 34 C.F.R. § 303.425 (parents can prevent changes in identification, evaluation, placement and services by requesting a formal hearing).

Rights of Which Parents Should Be Notified (continued)

RECOMMENDED POLICIES

10. (continued)

h. the right to utilize an advocate or lawyer in any and all dealings with the early intervention system; and

i. the right to utilize administrative and judicial processes to resolve complaints.

NOTES

10-1 (continued)
be permitted, as a matter of law, to attend all meetings that fit the description in subparagraph (g). While existing law gives parents the right to attend and participate in meetings in which an IFSP is developed, revised or reviewed,[4] it does not expressly afford parents the right to attend other meetings at which a decision is expected about a proposal to change the identification, evaluation or placement of their child, or the provision of services to the child or family. Nevertheless, we think that, as a matter of policy, states ought to afford parents this right. Such a right would promote collaboration between parents and professionals both by signaling to parents that they are full members of the Part H team and by enabling them to function as such;

h. The Part H regulations specify that parents have a right to the assistance of a lawyer or other advocate at IFSP meetings and in the course of administrative proceedings.[5] In addition, we believe that as a matter of due process of law, parents have a right to utilize a lawyer or advocate in all their dealings with the Part H system.

i. The right in subparagraph (i) to utilize complaint resolution processes is mandated by 20 U.S.C. § 1480(1), 34 C.F.R. § 303.420, and 34 C.F.R. § 303.511.

10-2 If, as we recommend in policy #6, parents are afforded the right to require the Part H system to obtain their informed consent to (a) evaluations subsequent to the initial evaluation and (b) changes in services, parents should be informed of this right.

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[4] *See* 20 U.S.C. § 1477(a)(2); 34 C.F.R 303.343

[5] 34 C.F.R. § 303.343(a)(1)(iii) & (b) (parents have right to have advocate present at the initial and at each annual IFSP meeting and at periodic meetings to review an IFSP); 34 C.F.R. § 303.422(b) (parents have right to assistance of lawyer and lay advocate in an administrative proceeding).

How Parents Should Be Notified of Their Rights

RECOMMENDED POLICIES

11. Parents should be notified of their rights in the following manner:

a. Both oral and written notice should be provided at multiple points in the family's involvement with the Part H system. Repetition is necessary because the information is complex, and parents may need to hear and discuss their rights several times in order to fully understand them. At a minimum, both an oral and written notice of rights should be provided when:

1) the family has its initial contact with the early intervention system;

2) the initial evaluation and assessment is proposed or refused;

3) the eligibility determination is made;

4) the IFSP is being developed or reviewed; and

5) a change in services or placement is proposed or refused.

b. The notice should be in language and by means of communication understandable to the parent.

c. Oral notice should be provided in the natural flow of conversation and in the context of emphasizing parental freedom and choice in the Part H system.

d. Information concerning parental rights should be included in the state's public awareness program.

NOTES

11-1 The Part H statute and regulations lack a comprehensive scheme for ensuring that parents who inquire about or avail themselves of Part H services are informed of and understand their rights. Instead, they contain a patchwork of provisions directing the Part H system to notify parents of particular rights in particular circumstances. These require that:

- When parents' consent to a particular activity is sought, the parents must be "fully informed of all information relevant to the activity," including information regarding their rights.[6]
- Notices of proposed actions and refusals to act must inform parents of "[a]ll procedural safeguards that are available under [the Part H regulations]";[7] and
- The state must notify parents generally, by publication and otherwise, of certain practices concerning the collection, maintenance and use of confidential information and of their rights under the Family Educational Rights and Privacy Act (FERPA).[8]

In our view, these provisions do not adequately ensure that parents will be informed of and understand their rights relating to the Part H system.

11-2 Parents should play a central role in the design and delivery of Part H services – a role we believe the state has a responsibility to assist them in fulfilling. Parents cannot effectively advocate for their children and family in the Part H system unless they are informed of and understand their rights. Accordingly, states should mount a deliberate, thoroughgoing effort to educate parents about their rights. Policies #11 and

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[6] 34 C.F.R. § 303.401(a)(1)

[7] 34 C.F.R. § 303.403(b)(3)

[8] 34 C.F.R. § 303.460 (incorporating by reference 34 C.F.R. § 300.561); 34 C.F.R. § 300.561 (state must notify parents generally, by publication and otherwise, of practices concerning the collection, maintenance, and use of confidential information and of their rights under FERPA).

How Parents Should Be Notified (continued)

RECOMMENDED POLICIES

12. Parents should be informed of their rights relating to the Part B system (the system of special education services for preschool and school age children mandated by Part B of the Education of the Handicapped Act) before their child's "graduation" from the Part H system. The information should be provided far enough in advance of the child's "graduation" to permit the parents to ensure that the child, if eligible, receives appropriate Part B services in a timely fashion. Parents should be informed, as well, of their rights relating to other services identified in the child's transition plan.

NOTES

11-2 (continued)
#12 reflect our judgment about the direction such an effort should take.

12-1 In our view it is critical for parents to be informed of their Part B rights at least six months in advance of their child's "graduation" from the Part H system. Armed with this information, parents can take steps to ensure that the child, if eligible, receives appropriate Part B services in a timely fashion. Informing parents of their Part B rights is consistent with, if not mandated by, the regulatory requirement that the Part H system take steps "to support the transition of the child ... to ... preschool services under Part B."[9] These steps must be outlined in the IFSP.[10]

12-2 The Part H system is required to take steps to support the transition of children not only to Part B services but also to "other services that may be available."[11] We believe these steps should include informing parents of their rights relating to such services.

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[9] 34 C.F.R. § 303.344(h)(1)(i).

[10] *Id.*

[11] 34 C.F.R. § 303.344(h)(1)(ii).

Providing Notice Before Significant Action Is Taken

RECOMMENDED POLICIES

13. Parents must receive timely notice in writing before a public agency or a service provider proposes or refuses to initiate or change the identification, evaluation or placement of their child or the provision of early intervention services to the child or family.

14. The notice must be in language understandable to the parent receiving it and provide sufficient detail to fully inform the parent about:

a. the action that is being proposed or refused;

b. the reasons for proposing or refusing the action, including a description of other options considered and the reasons for rejecting the options;

c. the information upon which the proposal or refusal is founded, including a description of each record or report used as a basis for the proposal or refusal;

d. if applicable, the parent's right to refuse to consent to the action, including any consequences for parent or child if the parent refuses to consent;

e. the parent's right to appeal the proposal or refusal to act, including a description of 1) the method of making

NOTES

13-1 The Part H regulations require that parents be provided timely written notice before any of the actions described in policy #13 are taken.[12] Such notice must be provided before the Part H program refuses parents' request to (a) evaluate the child, (b) find the child or family eligible for services, or (c) change the placement of the child or the services being provided to the child or family.[13]

14-1 The Part H regulations mandate that the written notice provided to parents in the circumstances described in policy #13 "be in sufficient detail to inform the parents about ... [t]he action that is being proposed or refused; ... [t]he reasons for taking the action; and ... [a]ll procedural safeguards that are available under [the regulations]."[14] The regulations, however, provide no guidance on how comprehensively the notice must describe either the "reasons" for the contemplated action or the "procedural safeguards" available to prevent or contest the action. We believe that, in order to truly inform the parents of the *reasons* behind an action, the notice must include a description of (a) other options that were considered, (b) the reasons for rejecting other options, and (c) any records and reports used as a basis for the action.[15] We also believe that, in order to truly inform parents of their *procedural rights*, the notice must include a description of (a) if applicable, the parents' right to refuse to consent to the action, including any consequences for the parent or child if the

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[12] 34 C.F.R. § 303.403(a).

[13] *Id.*

[14] 34 C.F.R. § 303.403(b).

[15] *See* 34 C.F.R. § 300.505(2)&(3) (requiring such information in notices provided in the Part B program).

Notice Before Significant Action (continued)

RECOMMENDED POLICIES

14. (continued)

such an appeal, 2) whether activities to which the parents object will be delayed pending the appeal, and 3) whether activities sought by the parent will be implemented pending the appeal; and

f. all other procedural safeguards available under the Part H statute and regulations.

NOTES

14-1 (continued)

parents exercise this right, and (b) the parents' right to appeal the contemplated action, including a description of the method of taking such an appeal and whether the contemplated action will be delayed until the conclusion of the appeal process.

14-2 The regulations require that the written notice provided to parents in the circumstances described in policy #13 be "in language understandable to the general public."[16] We prefer the formulation "in language understandable to the parents" because we believe that both written and oral notices should be comprehensible to those who will receive and act on them.

14-3 The regulations also require that the written notice provided to parents in the circumstances described in policy #13 inform them of "[a]ll procedural safeguards that are available under [the regulations]."[17] In our view, the notice should highlight the safeguards that are especially relevant to the action or refusal to act proposed by the Part H system.

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[16] 34 C.F.R. § 303.403(c)(i).

[17] 34 C.F.R. § 303.403(b)(3).

Notice in Parents' Native Language

RECOMMENDATIONS

15. Notice must be provided in the parents' native language unless it is clearly not feasible to do so. States should adopt policies specifically identifying the exceptional circumstances in which it is "clearly not feasible" to give notice in the parents' native language. (A state should rarely, if ever, fail to provide notice in the parents' native language.)

NOTES

15-1 Under the Part H statute and regulations, written notices to parents must be "[p]rovided in the native language of the parents, unless it is clearly not feasible to do so."[18] Neither the statute nor the regulations require states to adopt policies specifying the circumstances in which it is "clearly not feasible" to provide notice in the parents' native language. However, we strongly urge states to adopt such policies to safeguard against arbitrary and inappropriate interpretations of when these circumstances prevail.

15-2 The U.S. Secretary of Education has indicated that notice in the parents' native language is excused only when "it is not possible to find someone with the knowledge and skills needed to translate a notice."[19] In our view, such a circumstance exists only when the agency or provider obliged to provide the notice has failed to locate a competent translator after a comprehensive search that (a) ranges beyond the territory served by the agency or provider and (b) includes inquiries to the lead agency (which, we believe, should compile and maintain a list of translation resources). Through such a search, it should be possible in almost every case to locate at least a distant translator willing to prepare a written notice in the parents' native language or to orally translate a notice to the parents, over the telephone if necessary.

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[18] 34 C.F.R. § 303.403(c)(ii); 20 U.S.C. § 1480(6).

[19] Appendix A to Part H regulations, discussion of 34 C.F.R. § 303.403, 54 *Federal Register* 26342 (June 22, 1989).

Action to Be Taken When Written Notice Is Not Effective

RECOMMENDED POLICIES

16. If a parent's native language or usual mode of communication is not a written language (e.g., if the parent has a communication disability or is functionally or totally illiterate), steps must be taken to ensure that:

a. Any notice required to be provided in writing to the parent is translated orally to the parent in the parent's native language or provided in the mode of communication normally used by the parent (e.g., sign language, braille or oral communication);

b. The parent understands the notice; and

c. There is written evidence that the requirements of (a) and (b) have been met.

NOTES

16-1 Policy #16 is based on and incorporates the provisions of 34 C.F.R. § 303.403(2)&(3). It differs from the explicit language of the regulations in only one respect. The Part H regulations are silent on whether a functionally or completely illiterate parent is one whose "mode of communication ... is not a written language." We believe a parent who is functionally or totally illiterate is within the class protected by 34 C.F.R. § 303.403(2). Accordingly, as reflected in policy #16, we advise that states provide notice to such parents in the "mode of communication normally used by the parents," which in most cases will be oral communication.

Chapter 3

Right to Review and Correct Records

INTRODUCTION

The recommended policies governing parents' right to review and correct records are designed to ensure that:

- Parents have access to all records pertaining to their child or family, including records related to screening, evaluation, assessment, eligibility determinations and the development and implementation of the Individualized Family Service Plan (IFSP);
- Parents can request and receive explanations and interpretations of these records; and
- Parents may amend or, alternatively, supplement or explain records which they believe are inaccurate or misleading or violate the privacy or other rights of their child or family.

The Part H regulations require state Part H programs to follow the rules and procedures used in the Part B program to afford parents access to and an opportunity to correct records pertaining to their child and family. The Part B rules and procedures:

- Give parents the right to request information about the types and the locations of records collected, maintained or used in the program;
- Give parents a general right to inspect and review records that relate to their child;
- Permit states to withhold from parents certain limited categories of records;

- Include in parents' right to examine records: (a) the right to a response to reasonable requests for explanations and interpretations of records; (b) the right to copies of records at no expense when necessary to effectuate the parents' right to inspect and review; and (c) the right to have a representative of the parents inspect and review records; and
- Give parents a right to challenge information in a record they believe is inaccurate or misleading or violates the privacy or other rights of their child. Parents may request that such information be amended, appeal refusals to amend the information and, if they lose their appeal, place in the files of the agency maintaining the contested record a statement commenting on the information and/or setting forth their reasons for disagreeing with the decision made on appeal.

The recommended policies, for the most part, adapt these Part B rules and procedures to the Part H context. In doing so, the policies make clear that:

- Parents are entitled to receive from the lead agency, upon request, information about the types and locations of records collected, maintained or used by the Part H system.
- Parents are entitled to have access to all records pertaining to their child or family, including records related to: (a) screening, evaluation, assessment, eligibility determinations and the development and implementation of the IFSP; (b) individual complaints dealing with the child or family; and (c) "any other area under [Part H] involving records about the child and the child's family"[1]; and
- Parents are entitled to access to such records whether they are maintained by the lead agency, another public agency or a private provider.

In a few instances, the recommended policies urge that states modify a Part B rule or procedure that is incorporated by reference in the Part H regulations to better serve the interests of children and families participating in the Part H system. States may lawfully adopt these modifications because they expand rather than limit parents' rights. The modifications:

- Shorten the deadlines in the Part B regulations for responding to parents' requests for access to and correction of records;
- Allow parents to invoke the Part H procedures for complaint

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[1] 34 C.F.R. § 303.402

resolution instead of the procedures referenced in the Part B regulations; and

- Allow parents whose request for amendment of a record has been refused to place a corrective statement in the files of the agency or provider maintaining the record without first exhausting their administrative appeals. (Under the Part B regulations, states may insist that parents exhaust all administrative appeals before placing a corrective statement in an agency's or provider's files.)

KEY PROVISIONS OF FEDERAL LAW AND REGULATIONS

Part H Statute

Section 680. [also cited as 20 U.S.C. § 1480] The procedural safeguards required to be included in a statewide system...shall provide, at a minimum, the following:

(3) The opportunity for parents and a guardian to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the individualized family service plan.

Part H Regulations

§ 303.402 Opportunity to examine records.

In accordance with the confidentiality procedures in the regulations under Part B of the Act (C.F.R. 300.560 through 300.576), the parents of a child eligible under this part must be afforded the opportunity to inspect and review records relating to evaluations and assessments, eligibility determination, developments and implementation of IFSPs, individual complaints dealing with the child, and any other area under this part involving records about the child and the child's family.

§ 303.460 Confidentiality of information.

(a) Each State shall adopt or develop policies and procedures that the State will follow in order to ensure the protection of any personally identifiable information collected, used, or maintained under this part.

(b) These policies and procedures must meet the requirements in 34 C.F.R. 300.560 through 300.576 [Part B regulations], with the following modifications:

(1) Any reference to the "State educational agency" means the lead agency under this part.

(2) Any reference to "education of handicapped children," "education of all handicapped children," or provision of free public education to all handicapped children" means the provision of services to children eligible under this part and their families.

(3) Any reference to "local educational agencies" and "intermediate educational units" means local service providers.

Part B Regulations

§ 300.560 Definitions.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

Part B Regulations (continued)

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

§300.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 300.568.

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

§ 300.570 Hearing procedures.

A hearing held under § 300.568 of this subpart must be conducted according to the procedures under § 99.22 of [the FERPA regulations].

FERPA Regulations

§ 99.3 What definitions apply to these regulations?

"Record" means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

"Education records"

(a) The term means those records that are –

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include –

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are –

(i) Maintained separately from education records;

(ii) Maintained solely for law enforcement purposes; and

(iii) Disclosed only to law enforcement officials of the same jurisdiction;

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that –

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph(b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are –

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity.

(ii) Made, maintained, or used only in connection with treatmentof the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

POLICY RECOMMENDATIONS

Definition of Record

RECOMMENDED POLICIES

17. A "record" is any information, recorded in any way, maintained by an agency or service provider (whether public or private) or by any party acting for an agency or service provider.

NOTES

17-1 The Part H regulations do not themselves contain a definition of "record." However, they require, through a circuitous legal route, that states treat as "records" all information within the ambit of policy #17. The route to this result is as follows:

The Part H regulations require states, in the administration of their Part H program, to follow the procedures contained in the Part B regulations relating to parents' access to and right to correct "education records".[2]

In defining the term "education records," the Part B regulations refer the reader to another set of regulations, those implementing the Family Education and Privacy Rights Act of 1974, codified at 20 U.S.C. § 1232(g) and commonly known as "FERPA." The Part B regulations define the term "education records" to mean "the type of records covered under the definition of 'education records'" in FERPA.[3]

Under FERPA, an "education record" is a "record" that is "maintained by an educational agency or institution or by a party acting for the agency or institution."[4] A "record" is "any information recorded in any way."[5]

Policy #17 translates to the Part H context the definition of "education record" used in Part B and in FERPA.

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[2] 34 C.F.R. § 303.402.

[3] 34 C.F.R. § 300.560.

[4] 34 C.F.R. § 99.3 (definition of education record).

[5] 34 C.F.R. § 99.3 (definition of record).

RECOMMENDED POLICIES

18. "Records" include files, evaluations, reports, studies, letters, telegrams, minutes of meetings, memoranda, summaries, interoffice or intraoffice communications, memoranda reflecting oral conversations, handwritten or other notes, charts, graphs, data sheets, films, videotapes, slides, sound recordings, discs, tapes and information stored on microfilm or microfiche or in computer-readable form.

NOTES

18-1 Policy #18 lists some of the forms in which recorded information may be maintained by Part H agencies and providers. Each is a "record" under the FERPA regulations.[6] Hence, each is also a "record" for purposes of Part B[7] and Part H.[8]

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[6] See34 C.F.R. § 99.3 ("records" include, but are not limited to, information recorded "[by] handwriting, print, tape, film, microfilm, and microfiche").

[7] 34 C.F.R. § 300.560

[8] 34 C.F.R. § 303.402

Records to Which Parents Have Access

RECOMMENDED POLICIES

19. Except as provided in #21 below, parents must have access to all records regarding their child or family that relate to:

a. screening, evaluation, assessment, eligibility determinations and the development and implementation of the IFSP;

b. individual complaints dealing with the child or family; and

c. any other area under the Part H regulations involving records about the child and the child's family.

20. Parents' access may not be restricted based on the identity of the agency or provider maintaining the records. Parents are entitled to access to records maintained by the lead agency, another public agency or a service provider, whether public or private.

NOTES

19-1 Under the Part H regulations, parents must be given access, in accordance with Part B procedures, to records "relating to evaluations and assessments, eligibility determinations, and development and implementation of IFSPs, individual complaints dealing with the child, and any other area under the Part H regulations involving records about the child and the child's family."[9] Policy #19 implements this mandate. It also identifies some "other area[s] under the Part H regulations involving records about the child and the child's family," namely (a) the screening of children and (b) the filing of complaints dealing with family members other than an eligible child. Under the Part H regulations, parents must be given access to records about such matters.[10]

20-1 Neither the Part H nor the Part B nor the FERPA regulations authorize states to restrict access to records based on the character of the agency maintaining the records. Parents are therefore entitled to access to records of the type described in #19, whether maintained by the lead agency, another public agency or a public or private service provider.

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[9] 34 C.F.R. § 303.402.

[10] Id. .

Records to Which Parents Have Access (continued)

RECOMMENDED POLICIES

21. States may adopt policies denying parents access to the following records:

a. records of service, supervisory and administrative personnel that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

b. records of a law enforcement unit of a public agency or private provider, but only if: the unit's records are maintained solely for law enforcement purposes; the unit's records are disclosed only to law enforcement officials of the same jurisdiction; the unit's records are maintained separate from other records of the agency or provider; and other records of the agency or provider are not disclosed to the unit; and

c. records relating to an individual who is employed by an agency or provider that are made and maintained in the normal course of business, that relate exclusively to the individual in that individual's capacity as employee, and that are not available for use for any other purpose. This subparagraph does not apply to records relating to a parent who is employed as a result of the parent's status as a recipient of services or as a result of the parent's child's receiving services.

NOTES

21-1 The Part B regulations that are incorporated by reference in the Part H regulations give parents access only to "the type of records" covered under the definition of "education records" in FERPA.[11] FERPA specifically excludes from the definition of "education records" the sort of records described in policy #21. We doubt that Congress, in enacting the Part H statute's access provisions,[12] meant parents to have the right to review such records. Accordingly, in our view, states may adopt policies denying parents access to the type of records described in policy #21.

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[11] 34 C.F.R. § 300.560.

[12] 20 U.S.C. § 480(3).

Parents' Access Rights

RECOMMENDED POLICIES

22. When a parent asks to review a record, the agency or provider maintaining the record must comply with the request without unnecessary delay – in no event more than 14 days after the request is made. Priority should be given to parents' requests to review records in preparation for an IFSP meeting, a hearing or another time-sensitive event.

NOTES

22-1 Policies #22-#25 by and large implement Part B provisions incorporated by reference into the Part H regulatory scheme.[13] These provisions apply to "participating agencies."[14] A "participating agency" is defined by the Part B regulations as an "agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained" to carry out the Part B program.[15] We believe that, in the Part H context, a "participating agency" includes any public agency and private provider with records relating to the matters identified in policy #30(a)-(c).

22-2 Part B requires "participating agencies" to comply with parents' requests to inspect and review records "without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of [a] child, and in no case more than 45 days after the request has been made."[16] Policy #22 restates the Part B mandate that responses to parental requests for information be made "without unnecessary delay." Unlike Part B, however, the recommended policy requires compliance with such requests no later than 14 days after they are made because, as the U.S. Secretary of Education has noted, "the needs of children in the birth through two age range change so quickly."[17]

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[13] 34 C.F.R. § 303.402.

[14] *See* 34 C.F.R. §§ 300.562 and 300.566.

[15] 34 C.F.R. § 300.560.

[16] 34 C.F.R. § 300.562(a).

[17] Note to 34 C.F.R. § 303.423 (urging an accelerated timeframe for resolution of complaints).

Parents' Access Rights (continued)

RECOMMENDED POLICIES	NOTES
23. When records are requested in connection with a meeting regarding the IFSP or with a formal hearing to resolve a complaint (conducted pursuant to 34 C.F.R. § 303.420), the agency or provider shall provide the records prior to the meeting or hearing.	23-1 Policy #23 restates and translates into Part H language the Part B rule that when records are requested of a participating agency in connection with an IEP meeting or a due process hearing, the agency must comply with the request before the meeting or hearing is held.[18]
24. The right to review a record includes: **a.** the right to a response to reasonable requests for explanations and interpretations of the record; **b.** the right to obtain, free of charge, one copy of the record; and **c.** the right to have a representative of the parent's choosing review the record.	24-1 Policy #24 restates the Part B rule that the right to review a record includes (a) the right to a response to reasonable requests for explanations and interpretations of the record and (b) the right to have a representative of the parent review the record.[19] Unlike Part B, policy #24 gives parents the right to obtain, free of charge, a copy of the record. (Part B gives parents a right to copies at no cost only when necessary to effectuate the parents' right of access.)[20]
25. An agency or provider may not charge a fee to search for or to retrieve a record.	25-1 Policy #25 restates and applies to the Part H context the Part B rule that a "participating agency may not charge a fee to search for or to retrieve information" in response to a parental request.[21]

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[18] 34 C.F.R. § 300.562(a).

[19] 34 C.F.R. § 300.562(b)(1)&(3).

[20] 34 C.F.R. § 300.562(2).

[21] 34 C.F.R. § 300.566(b).

Right to Correct Records

RECOMMENDED POLICIES	NOTES
26. A parent may request that information in a record be amended (including that it be deleted) if: **a.** It is inaccurate or misleading; or **b.** It violates the privacy or other rights of the parent's child or family.	26-1 Policies #26 through #29 adapt to the Part H system the Part B rules that give parents a right to challenge information in a record they believe is inaccurate or misleading or violates the privacy or other rights of their child.[22] In the adaptation, three modifications were made, all of which states may lawfully adopt because they extend rather than limit parents' rights. The modifications are explained in the following notes.
27. When a parent requests that information in a record be amended, the agency or provider maintaining the record must act on the request without unnecessary delay and in no event more than 45 days after the request is made.	27-1 The Part B regulations require that a response be made to a parent's request for correction of a record "within a reasonable period of time."[23] Policy #27, however, requires that a response be made without unnecessary delay and in no event later than 45 days after the request is made.
28. If the agency or provider refuses to amend the information as requested, it must: **a.** inform the parent of the refusal; and **b.** advise the parent that she or he may appeal the refusal by invoking the administrative procedures of the Part H system for resolving parents' complaints (including formal hearings pursuant to 34 C.F.R. § 303.420, mediation where available or both).	28-1 Part B does not afford parents the right to a formal administrative hearing to appeal a refusal to amend a record.[24] Recommended policy #28 gives parents such a right. Also, policy #28 permits parents to resolve their complaints about the amendment of records through the complaint resolution processes generally available in the Part H system. We see no reason for the Part H system to treat parents' complaints about the amendment of records differently than other complaints. Given the complexity of the Part H system, and the difficulty that parents are likely to encounter in attempting to navigate it, we think there is great value in maintaining a single administrative system for resolving all parental complaints.

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[22] 34 C.F.R. § 300.567-300.570.

[23] 34 C.F.R. § 300. 567(b).

[24] 34 C.F.R. § 300.570 (administrative appeals of refusals to amend records may be conducted according to the informal procedures described in § 99.22 of the FERPA regulations).

Right to Correct Records (continued)

RECOMMENDED POLICIES

29. If the parent chooses not to appeal, or if the parent loses the appeal (i.e., the information is not amended as a result of the appeal), the parent may place in the files of the agency or provider maintaining the contested record a corrective statement commenting on the information in the record and, if the parent has lost an appeal, setting forth the parent's reasons for disagreeing with the decision on appeal.

a. The statement must be maintained along with the contested record; and

b. If the record or the information about which the parent has complained is ever disclosed by the agency or provider to any party, the statement must also be disclosed to that party.

NOTES

29-1 Under Part B, parents may be required to exhaust their administrative remedies before placing a corrective statement in an agency's or provider's files.[25] Policy #29 permits parents to place a corrective statement in an agency's or provider's files immediately after their request for a correction is refused, without having to first exhaust administrative appeals.

29-2 The Part B regulations provide that, after the parents place a corrective statement in the files of an agency or provider, the corrective statement must be disclosed "when the records of the child or the contested portion of [the records]" are disclosed. As discussed in the notes to policy #1, the term "record," as used in the Part B regulations, includes both the physical record itself and the information contained in it.[26] Thus, as policy #29 makes clear, parents' corrective statements must be disclosed whenever the records about which they have complained are disclosed *and* whenever the information that was at issue is disclosed (regardless of whether the physical records themselves are released).

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[25] *See* 34 C.F.R. § 300.569(b).

[26] 34 C.F.R. § 300.560 (incorporating FERPA's definition of "record'); 34 C.F.R. § 99.3 (under FERPA, the term "record" includes both the physical record itself and information contained in the record).

Information About What Records Agencies and Providers Maintain and Whom to Contact for Access to Them

RECOMMENDED POLICIES

30. The lead agency, upon request, must inform parents of the types and locations of records collected, maintained or used by public agencies and private providers relating to:

a. screening, evaluation, assessment, eligibility determinations or the development and implementation of Individualized Family Service Plans;

b. individual complaints dealing with children or families; or

c. any other area under the Part H regulations involving records about children and families.

NOTES

30-1 In our view, the requirement in the Part H statute and regulations that states assure parents access to Part H records implicitly requires compliance with policy #30. We believe that as a practical matter, parents will be unable to effectively exercise their right of access without information about the types and locations of the records maintained and used by the Part H system. Accordingly, parents must be given access, upon request, to such information.

30-2 It will not be difficult for lead agencies to implement policy #30. As explained in note 31-1, every public agency and service provider in the Part H system must maintain a list of the types and locations of records that it collects, maintains or uses regarding the matters identified in #30(a)-(c).[27] By compiling these lists, the lead agency could readily develop the information necessary to implement policy #30. (This information, once developed, will also assist the lead agency by enhancing its understanding of and hence its ability to manage the abundance of records that will be generated by and used in the Part H program.)

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[27] 34 C.F.R. § 300.565.

Information About Records and How to Gain Access to Them (continued)

RECOMMENDED POLICIES

31. Each public agency and private provider must provide to parents, upon request:

a. a list of the types and locations of records collected, maintained or used by the agency or provider relating to:

1) screening, evaluation, assessment, eligibility determinations or the development and implementation of IFSPs;

2) individual complaints dealing with children or families; or

3) any other area under the Part H regulations involving records about children or families; and

b. the title and address of the person to whom requests to review such records should be made.

NOTES

31-1 Policy #31(a) restates and adapts to the Part H context the Part B rule that "[e]ach participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency."[28] Compliance with the Part B rule is required by the Part H regulations.[29]

31-2 Neither the Part H nor the Part B regulations explicitly require agencies and providers to give parents on request the title and address of individuals to whom parents should address requests for records. Such a requirement may be imposed by the FERPA regulations, which gives parents the right to "a list of ... the titles and addresses of the officials responsible for [maintaining] ... records" within FERPA's purview.[30] However, as explained more fully in the introduction to the chapter on confidentiality, it is uncertain to what extent and in what manner this or other FERPA provisions apply to Part H agencies and providers that do not receive funds under programs administered by the U.S. Department of Education.[31] Regardless of whether it is legally mandated, we strongly urge states to adopt policy #31(b) to ensure that parents can find out where to direct their requests to review Part H records.

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[28] 34 C.F.R. § 300.565.

[29] 34 C.F.R. § 303.402 (parents must be afforded the opportunity to inspect and review records "in accordance with the ... procedures in [34] C.F.R. § 300.560 through § 300.576").

[30] 34 C.F.R. § 99.6(a)(2)(iv) (requiring adoption of a policy specifying "the titles and addresses of officials responsible for [maintaining] .... records" covered by FERPA); 34 C.F.R. § 99.7(a)(5)(requiring notice to parents of their right to obtain on request a copy of this policy).

[31] *Compare* Note to 34 C.F.R. § 303.460 (FERPA regulations "apply" to Part H program) *with* 34 C.F.R. § 99.1 (FERPA's rules imposed only on agencies and institutions that receive federal education funds).

Chapter 4

Confidentiality

INTRODUCTION

The recommended policies governing confidentiality of information are designed to ensure that:

- Parents may place reasonable limits on the disclosure of personal information about their child, their family and themselves, including limits on the sharing of such information among Part H agencies and providers; and
- Basic safeguards are provided to parents when they are asked to authorize an agency or provider either to disclose or to seek personal information.

The Part H statute requires states to protect the "right to confidentiality of personally identifiable information."[1] But neither the statute itself nor its legislative history defines the scope of this right or indicates how states should secure its protection. The Part H regulations also fail to identify the precise nature of a family's right to confidentiality.

The Part H regulations do adopt a scheme for protecting the confidentiality of personally identifiable information. Under the Part H regulations, states are obliged to follow the rules for protecting confidentiality that apply in the Part B program.[2] However, having been imported from the Part B program, these rules are not tailored to the unique characteristics of the Part H program, especially its multidisciplinary and multi-agency approach.

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[1] 20 U.S.C. § 1480(2).

[2] 34 C.F.R. § 303.460(b) (incorporating by reference the Part B regulations regarding the protection of confidential information).

The Part B confidentiality rules were designed for a program in which most activity, and hence most disclosures of personally identifying information, occurs within a single agency: the agency providing special education to the child. It is questionable whether application of these rules to a Part H system adequately protects families' right to confidentiality. If these regulations are interpreted as allowing relatively unfettered exchanges of confidential information among Part H agencies and providers, then a strong case can be made, we believe, that they violate congressional intent.

However, we find the Part H regulations' meaning uncertain and therefore do not venture here an opinion on whether they are consistent with congressional intent. First, it is unclear how the Part B rules should be and will be interpreted in the Part H context. Second, it is unclear how and to what extent the Part H or the Part B regulations incorporate the protections of the regulations implementing the Family Educational Rights and Privacy Act (FERPA).

A note to the Part H regulations indicates that the protections for confidential information in the FERPA regulations apply to the Part H program.[3] The general applicability of the FERPA confidentiality protections to the Part H program, however, raises several issues of statutory and regulatory interpretation. For example, when the Part B rules regarding confidentiality conflict with the FERPA rules, which set of rules should the Part H system follow?

Another question is: Do the FERPA rules apply to all agencies and providers in the Part H system or only to agencies and providers that are "educational" agencies or institutions? The FERPA regulations, by their own terms, apply only to an "educational agency or institution," defined in FERPA as any "public or private agency or institution" that receives money under a program administered by the U.S. Department of Education.[4] Although Part H itself is such a program, it is likely that some public agencies and private providers participating in the Part H system will receive neither Part H funds nor funds under another U.S. Department of Education program and, therefore, will not qualify as an "educational agency or institution" under FERPA.

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[3] Note to 34 C.F.R. § 303.460 ("[t]he Part B provisions incorporate by reference the [FERPA] regulations ... therefore, those regulations also apply to [the Part H program]"); Appendix A to Part H regulations, discussion of 34 C.F.R. § 303.403, 54 *Federal Register* 26343 (June 22, 1989) ("both the Part B and FERPA requirements ... apply to [the Part H program]").

[4] 34 C.F.R. § 99.3.

Finally, in the context of the Part H program, what is the meaning of the FERPA provisions that broadly permit the disclosure of confidential information, without prior parental consent, to "another school [or] school system"[5] or to "another educational agency or institution"? [6] Should the phrases "another school [or] school system" and "another educational agency or institution" be read literally or as references to "another" Part H program?[7]

If the Part H regulations concerning confidentiality are determined by a court or other authoritative source, such as a state attorney general, to violate Congress' intent, states would remain bound by the mandate in the Part H statute to protect families' "right to confidentiality of personally identifiable information."[8] Unless either Congress or the U.S. Department of Education prescribed a new set of rules, states would themselves be required to develop and implement policies to comply with that mandate.

The Task Force's recommended policies borrow from both the Part B and FERPA regulations and are designed to comply with relevant Part B and FERPA requirements. In our view, a state could ensure compliance with Part H confidentiality rules by adopting the policies recommended here. [9] But in the final analysis, these policies are our own creation. We urge their adoption not because we believe them to be mandated by federal law, but because they contain critical protections for families.

The recommended policies permit parents, if they so desire, to exercise control over the flow of information among the Part H agencies and providers involved with their child and family. Under the recommended policies:

- An agency or provider may disclose confidential information, *without* prior parental consent, to its employees who have a legitimate need for access to the information;
- All other disclosures of confidential information, including dis-

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[5] 34 C.F.R. § 99.31(a)(2)

[6] 34 C.F.R. § 99.34(b)

[7] *Cf.* 34 C.F.R. § 303.460(b)(2)&(3) (directing that, in applying Part B rules to the Part H program, any references to "education of handicapped children" be treated as references to "the provision of [Part H] services to children ... and their families," and any references to "local educational agencies" be treated as references to "local service providers").

[8] 20 U.S.C. § 1480(2).

[9] This is true with respect to matters about which we have made recommendations. However, we have not made recommendations concerning all topics addressed by the Part B and FERPA regulations. For example, the Part B regulations contain rules about the destruction of records, 34 C.F.R. § 300.573, and the FERPA regulations, about annual notifications of rights, 34 C.F.R. § 99.7. The Task Force has not addressed either issue in its recommended policies.

closures among Part H agencies and providers, may be made *only* with the informed consent of the parents;

- If a state has an umbrella public human services agency (e.g., a department of human services, human resources, or health and rehabilitative services), exchanges of confidential information among component units of the agency (e.g., mental health, developmental disabilities, public health, public welfare and juvenile justice) may be made *only* with the informed consent of the parents; and
- A state may permit exceptions to the above rules only in certain specified circumstances.

In addition, the recommended policies oblige Part H agencies or providers to provide to parents certain minimum protections when the agencies or providers ask parents to sign a general release permitting the disclosure of confidential information to others. The recommended policies require that when such a release is sought:

- Parents must be informed of their right both to refuse to sign the release and to revoke the release at any time;
- The release must list the agencies, providers and others to whom information may be given and must specify, for each, the type of information that may be given;
- Parents must be given an opportunity to limit the type of information provided under the release and to limit which agencies, providers and others may be given information. The release must provide ample space for parents to write in such limitations; and
- The release must be time-limited.

Similar protections are required for releases giving broad permission to an agency or provider to seek confidential information about a child or family.

KEY PROVISIONS OF FEDERAL LAW AND REGULATIONS

Part H Statute

Section 680. [also cited as 20 U.S.C. § 1480] The procedural safeguards required to be included in a statewide system...shall provide, at a minimum, the following:

(2) The right to confidentiality of personally identifiable information.

Part H Regulations

§ 303.401 Definitions of consent, native language, and personally identifiable information.

(c) "Personally identifiable" means that information includes –

(1) The name of the child, the child's parent, or other family member;
(2) The address of the child;
(3) A personal identifier, such as the child's or parent's social security number; or
(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

§ 303.460 Confidentiality of information.

(a) Each State shall adopt or develop policies and procedures that the State will follow in order to ensure the protection of any personally identifiable information collected, used, or maintained under this part.

(b) These policies and procedures must meet the requirements in 34 CFR 300.560 through 300.576, with the following modifications:

(1) Any reference to the "State educational agency" means the lead agency under this part.
(2) Any reference to "education of handicapped children," "education of all handicapped children," or "provision of free public education to all handicapped children" means the provision of services to children eligible under this part and their families.
(3) Any reference to "local educational agencies" and "intermediate educational units" means local service providers.

Part B Regulations

§ 300.560 Definitions.

As used in this subpart:

"Education records" means the type of records covered under the definition of "education records" in Part 99 of [the FERPA regulations].

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

§ 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or
(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to [the FERPA regulations] may not release information from education records to participating agencies without parental consent unless authorized to do so under [the FERPA regulations].

Part B Regulations (continued)

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures [concerning confidentiality].

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

FERPA Regulations

§ 99.3 What definitions apply to these regulations?

"Record" means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

POLICY RECOMMENDATIONS

What Information Is Confidential

RECOMMENDED POLICIES	NOTES
32. Personally identifiable information concerning a child, the child's parent or another family member is confidential.	32-1 Policy #32 declares that Part H agencies and providers must treat all personally identifiable information as "confidential." The policy is consistent with Part H, Part B, and FERPA regulations. Each set of regulations treats "personally identifiable information" as confidential.[10]
33. Personally identifiable information includes but is not limited to: **a.** the name of the child, the parent or other family member; **b.** the address of the child, the parent or other family member; **c.** a personal identifier, such as a social security number, of the child, parent or other family member; **d.** a description of personal characteristics or other information that would make it possible to identify the child, the parent or other family member with reasonable certainty; and **e.** information that would make the identity of the child, parent or other family member easily traceable.	33-1 Subparagraphs (a-d) of policy #33 essentially track the definition of "personally identifiable information" contained in the Part H regulations.[11] However, unlike the Part H definition, subparagraph (b) makes clear that not only the address of a child but also the address of any other family member is confidential. Subparagraph (d) makes clear that a list of personal characteristics or other information that would identify a family member other than a child is confidential.[12] 33-2 Subparagraph (e) of policy #33 is based on the definition of "personally identifiable information" in FERPA.[13] We believe Congress intended the Part H system to treat information of the type described in subparagraph (e) as confidential.[14]

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[10] *See* 34 C.F.R. § 303.460(a) (Part H); 34 C.F.R. § 300.571 (Part B); 34 C.F.R. § 99.30 (FERPA).

[11] 34 C.F.R. § 303.401(c).

[12] *See* 20 U.S.C. § 1480(2) (requiring states to preserve the confidentiality of *all* personally identifiable information).

[13] 34 C.F.R. § 99.3 ("personally identifiable information" includes information "that would make [a] student's identity easily traceable").

[14] *See* 20 U.S.C. § 1480(2) (requiring confidentiality for all personally identifiable information).

Disclosure of Confidential Information

RECOMMENDED POLICIES

34. Except as provided in policies #35, 36 and 37, all disclosures of confidential information, including disclosures among agencies and providers, may be made only with the parents' informed consent.

35. A public agency, subject to policy #36 below, or a service provider may disclose confidential information, without prior parental consent, to its employees who have a legitimate need for access to the information.

NOTES

34-1 In our view, family privacy can be safeguarded only if Part H agencies and providers neither seek nor release confidential information without prior parental consent.

35-1 Both the Part B and FERPA regulations prohibit disclosing confidential information, without prior parental consent, to persons who do not have a legitimate need for the information.[15]

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[15] 34 C.F.R. § 300.571(a) (under Part B, confidential information may be disclosed without consent only to "officials of participating agencies collecting or using the information" to fulfill Part B requirements or for "meeting a [Part B] requirement"); 34 C.F.R. § 99.31 (under FERPA, confidential information may be disclosed without parental consent only to those with specified interests).

Disclosure of Confidential Information (continued)

RECOMMENDED POLICIES

36. Many states have umbrella human services departments (e.g., public departments of human services, human resources, or health and rehabilitative services) with component agencies or units responsible for mental health, developmental disabilities, public health, public welfare and/or juvenile justice. Within such an umbrella department, each component agency or unit may, without prior parental consent, disclose confidential information to its own employees who have a legitimate need for access to the information. However, the component agencies or units may not share confidential information among themselves without the parents' prior informed consent, even where a legitimate need exists to do so. All exchanges of confidential information among component agencies or units, even within an umbrella department, must be authorized by the parents, except as provided by policy #37.

NOTES

36-1 Neither Part B nor FERPA speaks directly to the issue of exchanges of information among component units in an umbrella public service agency.[16] We strongly believe such exchanges should be permitted only with prior parental consent.

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[16] *But see* 34 C.F.R. § 300.571 (under Part B, disclosures permitted to "officials of participating agencies"); 34 C.F.R. § 99.31(a)(1)(under FERPA, an educational agency may disclose information without parental consent to "other school officials ... within the agency").

Disclosure of Confidential Information (continued)

RECOMMENDED POLICIES

37. The state may adopt policies to permit disclosures of confidential information without prior parental consent when:

a. The disclosure is to authorized representatives of the Comptroller General of the United States, the U.S. Secretary of Education or a state agency responsible for the administration of the Part H program; the disclosure is in connection with an audit or evaluation of the Part H program or for ensuring the program's compliance with legal mandates; and the representatives to whom disclosure is made protect against further disclosures of the information and destroy the information when no longer needed;

b. The disclosure is to organizations conducting studies to develop, validate or administer predictive tests, to administer financial aid programs, or to improve Part H services; *and*:

1) The study is conducted in a manner that does not permit personal identification of parents, children or family members by individuals other than representatives of the organization; *and*

2) The disclosed confidential information is destroyed when no longer needed for the purposes for which the study was conducted;

c. The disclosure is to accrediting or-

NOTES

37-1 The list of circumstances in subparagraphs (a-f) of policy #37 is based on, and adapted from, the FERPA regulations.[17] We have intentionally omitted from the list the circumstances described in the FERPA regulations covering financial aid and directory listings.[18] We do not approve of agencies' or providers' disclosing confidential information needed for determining financial aid without parental consent.[19] Parents may be informed that an application for aid cannot be made without their agreeing to release certain confidential information (if this is in fact the case). However, it should be up to the parents, not an agency or provider, to decide whether the application will be made and the information released. In addition, we do not approve of Part H agencies' or providers' publishing "directory information" without express parental consent.[20] Public disclosure of such information could stigmatize the child and the family.

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[17] *See* 34 C.F.R. §§ 99.31(a)(3),(5),(6)-(10)&(12).

[18] 34 C.F.R. § 99.31(a)(4)& (11).

[19] *See* 34 C.F.R. § 99.31(a)(4) (permitting such disclosures).

[20] *See* 34 C.F.R. §§ 99.31(a)(11) & 99.37 (permitting such conduct).

Disclosure of Confidential Information (continued)

RECOMMENDED POLICIES

37 (continued)
ganizations to carry out their accrediting functions;

d. The disclosure is to comply with a judicial order or lawfully issued subpoena and a reasonable effort has been made by the disclosing agency or provider to notify the parents of the order or subpoena in advance of compliance;

e. The disclosure is in connection with a health or safety emergency, and the disclosure is necessary to protect the health or safety of a child or another person; or

f. The disclosure is to a parent and the information concerns either the parent or the parent's child.

38. State policies adopted pursuant to policy #37 above must require that:

a. Parents must be informed, as soon as practicable, of disclosures made without their prior consent under the circumstances in policy #37 (b-e); and

b. All such disclosures must be noted in the child's or family's records.

NOTES

38-1 FERPA generally does not require notice to parents when a disclosure is made under the circumstances described in policy #37.[21] FERPA does, however, require that a record be maintained of each disclosure of confidential information made without prior parental consent.[22] Part B has a similar requirement,[23] which is incorporated by reference in the Part H regulations.[24] We believe that parents should be entitled not only to review a record of disclosures of confidential information made without their consent, but also to receive notice of such disclosures in most circumstances.

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[21] *But see* 34 C.F.R. § 99.34(a)(2) (sometimes requiring notice when a disclosure is made to another school or school system in which a student seeks or intends to enroll).

[22] 34 C.F.R. § 99.32.

[23] 34 C.F.R. § 300.563 (record must be kept of parties, other than parents and agency employees, who obtain access to education records).

[24] 34 C.F.R. § 303.560.

Minimum Safeguards for Releases Giving Broad Authority to Disclose Confidential Information to Other Parties

RECOMMENDED POLICIES

39. An agency or provider may request that parents provide a general release to disclose confidential information to others for legitimate purposes. However, when such a release is sought:

a. Parents must be informed of their right to refuse to sign the release. Notice of this right should appear on the release form;

b. The release form must list the agencies and providers and the individuals (by name or by position) to whom information may be given and specify the type of information that might be given to each;

c. Parents must be given the opportunity to limit the information provided under the release and to limit the agencies, providers and persons with whom information may be shared. The form must provide ample space for parents to express such limitations in writing;

d. The release must be revocable at any time. The release form must inform parents of this fact; and

e. The release must be time-limited. The release should be effective only until the initial IFSP is developed or, if an IFSP has already been developed, until the next IFSP review. (We anticipate that when the IFSP team meets to develop or review an IFSP, parents will be asked to

NOTES

39-1 We believe parents should have the right to sign a release giving an agency or provider broad authority to disclose confidential information to other parties. Giving an agency or provider such authority will often enhance its ability to work collaboratively with other agencies and providers serving a child or family. In addition, we believe Part H agencies and providers should be free to ask parents for such authority when it will improve their ability to serve the child or family. However, we believe parents must be afforded certain minimum safeguards when asked for such authority. These safeguards are outlined in policy #39.

39-2 Neither Part B nor FERPA address whether an agency or provider may ask parents for broad authority to disclose confidential information to others.[25] In our view, neither Part B nor FERPA forbids any agency or provider from obtaining such authority as long as parents' rights are respected in the process.

39-3 To help parents express any limitations they wish to impose on a general release (see subparagraph (c) of policy #39), we suggest that states use a form with a three-column checklist. The first column would list each agency and provider with whom information might be shared. The second column would list, with respect to each such agency or provider, the type of information that might be shared. The third column would invite parents to check a "yes" box or a "no" box indicating whether they wish to provide general authority for the disclosure of a particular type of information to a particular agency or provider.

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[25] *But see* Appendix to FERPA regulations, discussion of waiver of rights, 53 *Federal Register* 11949 (April 11, 1988) (suggesting that parents may waive their FERPA rights).

Safeguards for Releases Giving Broad Authority to Disclose (continued)

RECOMMENDED POLICIES

39 (continued)
review and, if appropriate, renew general releases they have previously executed.)

40. Each public agency and service provider should keep a log, accessible to the parents, of all disclosures of confidential information made pursuant to a general release executed by the parents.

NOTES

39-4 Parents may find the process of executing releases for several Part H agencies and providers burdensome or confusing. Accordingly, we believe parents should have a right to request that the case manager supervise and monitor the process. The case manager would be responsible for ensuring, among other things, that the parents' wishes are accurately reflected in the releases they sign.

40-1 Policy #40 requires that a notation be entered in a child's or family's records of all disclosures of confidential information made pursuant to a general release. This requirement is consistent with both the Part B requirement that a record be maintained of all "parties obtaining access" to a record, including the date and purpose of the access[26] and the FERPA requirement that a record be maintained of disclosures of confidential information made without express parental consent.[27]

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[26] 34 C.F.R. § 300.563.

[27] 34 C.F.R. § 99.32.

Special Treatment of Sensitive Information

RECOMMENDED POLICIES

41. Special measures should be taken to protect the confidentiality of sensitive information (e.g., information relating to sexual or physical abuse, mental health treatment, HIV status or a child's parentage and any other information that the parents consider sensitive).

NOTES

41-1 However a state ultimately decides to structure its system for protecting the confidentiality of personally identifiable information, we strongly urge that it provide special treatment for sensitive information to ensure that it is not disclosed to anyone without prior parental consent.

41-2 One possible method for ensuring against unauthorized disclosures is to maintain all sensitive information in a special file that (a) is handled with special precautions and (b) can be accessed only with prior express parental permission. (The State of Tennessee apparently intends to use such a system.)

Release of Part H Records to Agencies and Providers Who Will Serve the Child After "Graduation" from the Part H System

RECOMMENDED POLICIES

42. a. With the parents' informed consent, confidential Part H records may be provided to the public schools when a child is enrolled in school. If the parents refuse to consent, confidential Part H records may not be intermingled with public school records, including records relating to special education, even if the state education agency ("SEA") is the Part H lead agency.

b. With the parents' informed consent, confidential Part H records may be provided to any other agency or provider that will serve the child after "graduation" from the Part H system.

NOTES

42-1 The Part H regulations require parental consent before records of a child "graduating" the Part H system are provided to the public schools.[28] Policy #42 implements this requirement.

42-2 We believe parental consent should be obtained, as well, before Part H records are released to any other agency or provider that will serve the child after "graduation" from the Part H system. Obtaining consent in this circumstance is also required by recommended policy #34.

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[28] 34 C.F.R. § 303.344(h)(2)(iii).

Redisclosure of Confidential Information Obtained from Another Agency or Provider

RECOMMENDED POLICIES

43. An agency or provider may, without parental consent, redisclose confidential information obtained from another party only if such redisclosure is both:

a. permitted under the terms of the original disclosure made to the agency or provider; and

b. either:

1) permitted by state policies adopted pursuant to policy #37; or

2) consistent with a general release provided by the parents that meets the requirements of policy #39.

NOTES

43-1 Policy #43 effectuates the principles of policies #34-#39 in the context of redisclosures.

43-2 Policy #43 draws on, and serves a purpose similar to, the FERPA provisions relating to redisclosure of information by educational agencies and institutions.[29]

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[29] *See* 34 C.F.R. § 99.33.

Seeking Confidential Information

RECOMMENDED POLICIES

44. A public agency or a service provider may not seek confidential information about a child or family, without the parents' informed consent, unless:

a. It is legally required to do so (e.g., to investigate alleged child abuse or neglect); or

b. Acquisition of the information is necessary to respond to a health or safety emergency.

NOTES

44-1 The policies in #34-#39 ensure against releases of confidential information without prior parental consent. Policies #44-45 protect against acquisition of confidential information without consent.

44-2 Policy #44 applies to tests and other assessments conducted by an agency or provider. Thus, home environment observations and parent/child interaction assessments may be conducted only with the parents' prior informed consent. Policy #44 also applies to requests made to another agency or provider for release of confidential records. Under #44, a Part H agency or provider is barred from making such requests without first obtaining the parents' informed consent.

44-3 Subparagraph (b) of policy #44 is adapted from FERPA.[30]

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[30] *See* 34 C.F.R. § 99.31(a)(10).

Seeking Confidential Information (continued)

RECOMMENDED POLICIES

45. An agency or provider may request that parents sign a general authorization bestowing broad authority upon the agency or provider to seek confidential information from others to meet a legitimate need. However, when such authority is sought:

a. Parents must be informed of their right to refuse to provide such authority. Notice of the right to refuse should appear on the written authorization the parents are asked to sign;

b. The authorization must list those from whom information may be sought and specify the type of information that might be sought from each;

c. Parents must be given the opportunity to limit the information acquired pursuant to the authorization and to limit the parties from whom information may be sought; and the authorization form must provide ample space for parents to write in such limitations;

d. The authorization must be revocable at any time, and the authorization form must inform parents of this fact; and

e. The authorization must be time-limited. The authorization should be effective only until the initial IFSP is developed or, if an IFSP has already been developed, until the next IFSP review. (We anticipate that, when the IFSP team meets to develop or review an IFSP, parents will be asked to review and, if

NOTES

45-1 Policy #45 serves purposes similar to policy #37. We believe that parents, if they so desire, should be able to broadly authorize an agency or provider to acquire confidential information. Giving an agency or provider such authority may enhance its ability to serve a child or family. In addition, we believe that Part H agencies and providers should be able to ask parents for such authority. However, when parents are asked, we believe they should be afforded certain minimum safeguards, as outlined in policy #45.

45-2 Neither the Part B regulations nor the FERPA regulations incorporated by the Part H regulations directly address the matter of an agency's or provider's acquiring confidential information concerning a child or family. The Part H regulations address the matter only in the context of the initial evaluation and assessment and, in that context, only indirectly. The regulations provide that parental consent be obtained before the initial evaluation and assessment is conducted, i.e., before any significant amount of confidential information regarding a child or family is obtained.[31]

45-3 To help parents express any limitations they wish to impose on the acquisition of confidential information (see subparagraph (c) of policy #45), we suggest that states use an authorization form with a three-column checklist. The first column would list each agency, provider or type of person (i.e., neighbors, other family members) from whom information might be sought. The second column would list, with respect to each such agency, provider or person, the type of information that might be sought. The third column would invite parents to check a "yes" box or a "no" box indicating whether they wish to generally authorize

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31. 34 C.F.R. § 303.404(a)(1).

Seeking Confidential Information (continued)

RECOMMENDED POLICIES

45 (continued)

appropriate, renew general authorizations they have previously executed.)

NOTES

45-3 (continued)
obtaining a particular type of information from a particular agency, provider or type of persons.

45-4 Parents may find the process of executing authorizations for several Part H agencies and providers burdensome or confusing. Accordingly, we believe they should have a right to request that the case manager supervise and monitor the process. The case manager would be responsible for ensuring, among other things, that the parents' wishes are accurately reflected in the authorizations they sign.

Chapter 5

Administrative Procedures for Resolving Parents' Complaints

INTRODUCTION

The recommended policies governing administrative procedures for resolving parents' complaints are designed to ensure that:

- Parents have ready access to an administrative process with the authority to resolve complaints about actions taken by the Part H system; and
- Parents may choose informal mediation of their complaints instead of or in addition to using the formal hearing process.

The Part H regulations give parents a right to have their complaints resolved through a formal hearing process. Under the regulations, the lead agency is responsible for ensuring that a formal hearing process is established, that the process meets all regulatory requirements, and that it is effectively implemented.

The regulations provide two options for the basic design of the formal hearing process. The state may adopt the due process procedures afforded to parents by Part B of the Education of the Handicapped Act. Alternatively, the state may develop a different set of procedures that meet specified requirements, including the following:

- The hearing officer (the person who both conducts the hearing and renders a decision after the hearing is concluded) must be impartial;
- At the hearing, parents have a right to be represented by coun-

sel or an advocate, to present evidence, to compel the attendance of witnesses and to cross-examine opposing witnesses;

- Hearings must be held at times and places reasonably convenient for the parents; and
- The hearing must be concluded and a written opinion issued within 30 days after the date the hearing was requested.

The regulations permit but do not require a state to give parents the opportunity to resolve complaints through a mediation procedure. They specify, however, that:

- Parents' participation in mediation must be voluntary;
- Parents may not be required to mediate complaints before requesting a formal hearing; and
- If parents request a formal hearing, either before or while engaged in mediation efforts, the hearing must be held and a final decision must be rendered within the time limit prescribed by law. (The deadline may be extended, however, if the parents consent.)

In our view, the formal hearing system established by the regulations is basically sound. We urge several modest yet important improvements:

- When parents request a hearing, they should be informed of any free or low-cost legal or advocacy services available to them and be given a list of organizations that provide or arrange such services (e.g., parent training and information centers, protection and advocacy programs and legal aid organizations);
- The lead agency should adopt procedures for conducting expedited hearings in exceptional circumstances;
- In situations of particular urgency, the hearing officer should render a decision orally at the conclusion of the hearing and file a written explanation later;
- Hearing officers should be required to include conclusions of law as well as findings of fact in their decisions;
- Hearing decisions, with information that identifies a child or family deleted, should be maintained in a central file accessible to parents and the public; and
- Parents whose formal complaint is upheld should be entitled to recover attorney's fees from the state.

The recommended policies also make explicit two requirements we believe are inherent in the formal hearing system mandated by the regulations:

- Decisions must be enforceable against all public agencies in the Part H system; and
- The hearing system must have the authority to resolve parents' complaints about being asked to pay for a specific early intervention service.

Further, the recommended policies encourage states to give parents the option of mediating complaints. We strongly believe that mediation should be a mainstay of state systems for resolving parental complaints. Parents' complaints can often be resolved more swiftly, at less cost, and with substantially less stress and more cooperation through mediation than through a formal hearing. Many states, in the administration of their Part B system, have established mediation procedures in addition to the formal hearing process mandated by law. For the most part, we understand, both parents and state officials have been pleased with the results; we believe similar results can be achieved in the Part H context.

Finally, the recommended policies make suggestions for effectively implementing provisions of the Part H regulations that require the lead agency to have an administrative system for resolving complaints of parents and others in addition to the formal hearing system. We urge that this system:

- Accept oral as well as written complaints;
- Assist parents and others in filing complaints;
- Develop specific criteria and procedures for determining when an on-site investigation is needed, for interviewing complaints and for permitting complainants and their representatives to participate in the fact-finding process; and
- Issue written decisions that include findings of fact and conclusions of law and address the merit of each alleged illegality.

KEY PROVISIONS OF FEDERAL LAW AND REGULATIONS

Part H Statute

Section 680. [also cited as 20 U.S.C. § 1480] The procedural safeguards required to be included in a statewide system ...shall provide, at a minimum, the following:

(1) The timely administrative resolution of complaints by parents. Any party aggrieved by the findings and decisions regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. . . .

(7) During the pendency of any proceeding or action involving a complaint, unless the state agency and the parents or guardian otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided or if applying for initial services shall receive the services not in dispute.

Part H Regulations

§ 303.400 General responsibility of lead agency for procedural safeguards.

Each lead agency shall be responsible for—

(a) Establishing or adopting procedural safeguards that meet the requirements of this subpart, and

(b) Ensuring effective implementation of the safeguards by each public agency in the State that is involved in the provision of early intervention services under this part.

§ 303.403 Prior notice; native language.

(a) General. Written prior notice must be given to the parents of a child eligible under this part a reasonable time before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family.

§ 303.420 Administrative resolution of individual child complaints by an impartial decisionmaker.

Each system must include written procedures for the timely administrative resolution of individual child complaints by parents concerning any of the matters in § 303.403(a). A State may meet his requirement by—

(a) Adopting the due process procedures in 34 C.F.R.300.506 through 300.512 [Part B regulations]; or

(b) Developing procedures that—
  (1) Meet the requirements in § 303.421 through § 303.425; and
  (2) Provide parents a means of filing a complaint.

[See the side-by-side comparison on the following pages of the Part H and Part B regulations cited in § 303.420.]

. . .

Note 2: It is important that the administrative procedures developed by a State be designed to result in speedy resolution of complaints. An infant's or toddler's development is so rapid that undue delay could be potentially harmful. In an effort to facilitate resolution, States may wish, with parental concurrence, to offer mediation as an intervening step prior to implementing the procedures in this section. Although mediation is not required under either Part B or Part H of the Act, some States have reported that mediations conducted under Part B have led to speedy resolution of differences between parents and agencies, without the development of an ad-

Part H Regulations (continued)

versarial relationship and with minimal emotional stress to parents.

While a State may elect to adopt a mediation process, the State cannot require that parents use that process. Mediation may not be used to deny or delay a parent's rights under this part. The complaint must be resolved, and a written decision made, within the 30 day timeline in § 303.423.

§ 303.510 Adopting complaint procedures.

Each lead agency shall adopt written procedures for –

(a) Receiving and resolving any complaint that one or more requirements of this part are not being met; and

(b) Conducting an independent onsite investigation of a complaint if the lead agency determines that an onsite investigation is necessary.

Note: Because of the interagency nature of Part H of the Act, complaints received under these regulations could concern violations by (1) any public agency in the State that receives funds under this part (e.g., the lead agency and the Council), (2) other public agencies that are involved in the State's early intervention program, or (3) private service providers that receive Part H funds on a contract basis from a public agency to carry out a given function or provide a given service required under this part. These complaint procedures are in addition to any other rights under State or Federal law. Complaints under these procedures are filed with the lead agency.

§ 303.511 An organization or individual may file a complaint.

An individual or organization may file a written signed complaint with the lead agency. The complaint must include –

(a) A statement that the State has violated a requirement of Part H of the Act or the regulations in this part; and

(b) The facts on which the complaint is based.

§ 303.512 Minimum complaint procedures.

Each lead agency shall include the following in its complaint procedures:

(a) A time limit of 60 days after the agency receives the complaint –

(1) To carry out an independent onsite investigation, if necessary; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the lead agency.

§ 303.525 Delivery of services in a timely manner.

Each lead agency is responsible for the development of procedures to ensure that services are provided to eligible children and their families in a timely manner, pending the resolution of disputes among public agencies or service providers.

COMPARISON OF RELEVANT PROVISIONS OF PART H (§§303.421-.435) AND PART B (§§300.506-.512)

Part H	Part B
§ 303.421 Appointment of an impartial person. (a) Qualifications and duties. An impartial person must be appointed to implement the complaint resolution process in this subpart. The person must – (1) Have knowledge about the provisions of this part, and the needs of, and services available for, eligible children and their families; and (2) Perform the following duties: (i) Listen to the presentation of relevant viewpoints about the complaint, examine all information relevant to the issues, and seek to reach a timely resolution of the complaint. (ii) Provide a record of the proceedings, including a written decision.	**§ 300.506 Impartial due process hearing.** (a) A parent or a public educational agency may initiate a hearing... (b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child,...
(b) Definition of impartial. (1) As used in this section, "impartial" means that the person appointed to implement the complaint process – (i) is not an employee of any agency or program involved in the provision of early intervention services or care of the child; and (ii) Does not have a personal or professional interest that would conflict with his or her objectivity in implementing the process. (2) A person who otherwise qualifies under paragraph (b)(1) of this section is not an employee of an agency solely because the person is paid by the agency to implement the complaint resolution process.	**§ 300.507 Impartial hearing officer.** (a) A hearing may not be conducted: (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or (2) By any person having a personal or professional interest which would conflict with this or her objectivity in the hearing. (b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. (c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.
Appendix A to Part H Regulations Appointment of an impartial person (§ 303.421) . . . *Comment:* Some commenters requested that the phrase "to the child involved in the complaint" be deleted from the requirement that an impartial person not be "an employee of any agency involved in providing early intervention services to the child involved in the complaint."	

Part H (continued)	Part B (continued)
Discussion: To ensure objectivity in the complaint resolution process, the Secretary believes that the impartial person should not be an employee of any agency or program involved in the provision of early intervention services or the care of the child, especially since the entire Part H program is a State-run program under the responsibility of the lead agency.	
Change: The phrase "to the child involved in the complaint" has been deleted, and a prohibition against the use of an employee of any agency or program involved in the provision of early intervention services or in the care of the individual child has been added at § 303.421(b)(1)(i).	**[§ 300.506 Impartial due process hearing.]** (c) The public agency shall inform the parent of any free or low cost legal and other relevant services available in the area if: (1) The parent requests the information; or (2) The parent or the agency initiates a hearing under this section.
§ 303.422 Parent rights in administrative proceedings.	**§ 300.508 Hearing rights.**
(a) General. Each lead agency shall ensure that the parents of children eligible under this part are afforded the rights in paragraph (b) of this section in any administrative proceedings carried out under §303.420.	(a) Any party to a hearing has the right to:
(b) Rights. Any parent involved in an administrative proceeding has the right to – (1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early intervention services for children eligible under this part; (2) Present evidence, and confront, cross examine, and compel the attendance of witnesses; (3) Prohibit the introduction of any evidence at the proceeding that has not been disclosed to the parent at least five days before the proceeding; (4) Obtain a written or electronic verbatim transcript of the proceeding; and (5) Obtain written findings of fact and decisions decisions.	(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children; (2) Present evidence and confront, cross examine, and compel the attendance of witnesses; (3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing; (4) Obtain a written or electronic verbatim record of the hearing; (5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel...).

Part H (continued)

§ 303.423 Convenience of proceedings; timelines.

(a) Any proceedings for implementing the complaint resolution process in this subpart must be carried out at a time and place that is reasonably convenient to the parents.

(b) Each lead agency shall ensure that not later than 30 days after the receipt of a parent's complaint, the impartial proceeding required under this subpart is completed and a written decision mailed to each of the parties.

Part B (continued)

(b) Parents involved in hearings must be given the right to:

  (1) Have the child who is the subject of the hearing present; and

  (2) Open the hearing to the public.

§ 300.512 Timeliness and convenience of hearings and reviews.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

  (1) A final decision is reached in the hearing; and

  (2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

  (1) A final decision is reached in the review; and

  (2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

§ 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under §300.510 or § 300.511.

§ 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of

Part H (continued)

§ 303.424 Civil action.

Any party aggrieved by the findings and decisionregarding an administrative complaints has the right to bring a civil action in State or Federal court....

§ 303.425 Status of a child during proceedings.

(a) During the pendency of any proceeding involving a complaint under the subpart, unless the public agency and parents of a child otherwise agree, the child must continue to receive the appropriate early intervention services currently being provided.

(b) If the complaint involves an application for initial services under this part, the child must receive those services that are not in dispute.

Part B (continued)

the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;
(2) Insure that the procedures at the hearing were consistent with the requirements of due process;
(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.508 apply;
(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;
(5) Make an independent decision on completion of the review; and
(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 300.512.

§ 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 300.510 has the right to bring a civil action under section 615(e)(2) of the [Education of the Handicapped] Act.

POLICY RECOMMENDATIONS

The System for Conducting Formal Hearings

RECOMMENDED POLICIES

46. The lead agency must ensure the establishment and operation of a system for conducting formal hearings that:

a. entertains parents' complaints about identification; screening; evaluation; assessment; eligibility determinations; the development, review, and implementation of the IFSP; and the failure to respect parents' procedural rights;

b. provides to parents a clear and easy-to-use method of requesting a hearing; and

c. is capable of resolving through a single proceeding a complaint involving two or more public agencies or involving private providers under the jurisdiction of different agencies.

NOTES

46-1 The lead agency is responsible for ensuring the existence and operation of a system for conducting formal hearings that complies with regulatory requirements.[1]

46-2 The Part H regulations specify that formal hearings must be available to resolve parents' complaints concerning "any of the matters in 34 C.F.R. § 303.403(a)."[2] The referenced "matters" are a public agency's or private service provider's proposal or refusal to "initiate or change the identification, evaluation, or placement of [a] child, or the provision of appropriate early intervention services to the child and the child's family."[3] In the context of § 303.403(a), "services" includes "assessment."[4] While § 303.403(a) does not specifically mention either screening or failure to respect parents' procedural rights, any restrictive interpretation that would prevent parents from filing complaints about such matters would, we believe, run afoul of congressional intent.[5] As we read the legislative history to Part H, Congress intended the formal hearing process for resolving parents' complaints to extend to such matters.

46-3 The regulations require states to provide to parents "a means of filing a complaint" to invoke the formal hearing process.[6] While the regulations do not specify the "means," they must not be so burdensome as to effectively deny parents their hearing rights. Ac-

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1. 34 C.F.R. § 303.400, § 303.422(a), and § 303.423(b).
2. 34 C.F.R. § 303.420.
3. 34 C.F.R. § 303.403(a).
4. 34 C.F.R. § 303.12 (definition of early intervention services).
5. *See* 20 U.S.C. § 1480(1) (requiring a system for resolution of parents' "complaints" and placing no limits on the type of complaints that parents might file).
6. 34 C.F.R. § 303.420(b)(2).

System for Conducting Hearings (continued)

RECOMMENDED POLICIES

NOTES

46-3 (continued)

cordingly, in our view, states may not prescribe different procedures for filing a complaint against the various agencies or providers involved with early intervention services or for challenging different types of conduct. We believe it would be unreasonably burdensome to require parents to interpret complex policies governing how they may initiate a complaint before exercising their rights.

46-4 The regulations envision that a parent's complaint will be resolved in a single proceeding. Therefore, however the state structures its hearing system, it must ensure that the system is capable of resolving in a single proceeding a complaint involving more than one public agency or private providers under the jurisdiction of different agencies. This cannot be achieved in a system in which each public agency is responsible for conducting hearings only on complaints leveled against itself or against providers under its jurisdiction. In such a system, a parent must initiate multiple proceedings to resolve a complaint involving more than one agency or involving providers under the jurisdiction of different agencies. Requiring a parent to follow such a course would, we believe, run afoul of both congressional intent and the intent of the Part H regulations.

Power to Enforce Decisions

RECOMMENDED POLICIES

47. Decisions rendered by the system must be enforceable against all public agencies in the Part H system.

NOTES

47-1 The Part H statute and regulations require that the formal hearing system be able to *resolve* parents' complaints.[7] Decisions rendered by the formal hearing system must therefore be enforceable against all public agencies in the Part H system.[8]

47-2 The Part H regulations do not specify what public agencies should be parties to formal hearings initiated by parents. In our view, the lead agency should be a party to all formal hearings, as it has the final responsibility to ensure that the Part H system operates in conformity with law. In addition, we believe that all public agencies with direct responsibility for the matters complained of by the parents should be parties as well. However, we believe that, in most circumstances, the lead agency and the other public agencies that are parties to the proceeding should be required to conduct a common or unified defense, speaking through only one lawyer or representative.

47-3 Private providers need not be parties to formal hearings initiated by parents. Under the Part H statute and regulations, services rendered by these providers must be "under public supervision."[9] The public agencies supervising the delivery of services by private providers must be capable of enforcing any decision rendered by the formal hearing process regarding the providers' conduct.

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[7] 20 U.S.C. § 1480(1); 34 C.F.R. § 303.420.

[8] *See* Note 1 to 34 C.F.R. § 303.420 (public agencies are "bound by" and "required to implement" decisions rendered by the formal hearing system, if not reversed on appeal).

[9] 20 U.S.C. § 1472(2)(A); 34 C.F.R. § 303.12(a)(3)(i).

Power to Resolve Parents' Complaints about Being Asked to Pay for a Specific Service

RECOMMENDED POLICIES

48. The system must have the authority to resolve parents' complaints about being asked to pay for a specific early intervention service. The system must therefore be able to render an enforceable decision regarding the following matters:

a. whether the state is obliged to provide a given early intervention service at no cost to the parents, regardless of the parents' financial resources (i.e., even if the parents could afford to pay for the service). Parents may not be required to pay for a service, regardless of their financial resources, if:

1) The service is part of a function that, under the Part H regulations, must be carried out at public expense (e.g., child find; evaluation and assessment; case management; development, review and evaluation of the IFSP; and implementation of procedural safeguards);

2) The service must be provided at no cost pursuant to a state law requiring the provision of a free appropriate public education to children with handicaps from birth; or

3) There is no federal or state law that provides for a system of payments by families for the service, including a schedule of sliding fees.

b. whether the parents are able to pay for the service or provide the service

NOTES

48-1 The formal hearing system must entertain a parent's complaint that it is improper to require the parent to pay for a given early intervention service. Under the Part H regulations, the formal hearing system is required to entertain any complaint regarding any "matters" within the purview of 34 C.F.R. § 303.403(a).[10] In our view, the refusal to provide an early intervention service at no cost is such a matter.[11] Furthermore, we believe that Congress, in enacting the Part H statute, intended parents to have a right to a formal hearing on complaints concerning their financial responsibility.

48-2 The standards set out in subparagraphs (a) and (b) of policy #48 are drawn from the Part H regulations.

a. Subparagraph (a) is based on 34 C.F.R. § 303.520(b)(3)(i), which prohibits the Part H system from charging a fee for services that a child or family is entitled to receive at no cost; 34 C.F.R. § 303.521(b), which identifies functions that the Part H system is required to carry out at public expense regardless of parents' ability to pay; 34 C.F.R. § 303.521(c), which prohibits the Part H system from charging a fee for a service that must be provided at no cost pursuant to a state law requiring the provision of a free appropriate public education to children with handicaps from birth; and 34 C.F.R. § 303.12(a)(3)(iv), which requires that early intervention services be provided at no cost to the parents unless federal or state law provides a system of payment by families, including a schedule of sliding fees.

b. Subparagraph (b) is based on 34 C.F.R. § 303.520(b)(3)(i), which prohibits the Part H system from charging a fee for services that a child or family is entitled to receive at no

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[10] 34 C.F.R. § 303.420.

[11] 34 C.F.R. § 303.403(a)(notice required when an agency or provider refuses, among other things, to provide an early intervention service).

Resolution of Complaints about Payment for a Service (continued)

RECOMMENDED POLICIES

48. (continued)
themselves (e.g., transportation). If the parents are unable to pay for or provide the service, the service must be provided free of charge.

49. If the state is required to provide the service at no cost to the parents, the service may not be delayed or denied in the event of a dispute about which public agency or agencies should pay for it.

a. The service must be provided pending the resolution of any such dispute among agencies.

b. The state must have procedures for achieving a timely resolution of disputes among agencies regarding responsibility for paying for a particular service. These procedures must meet the requirements of 34 C.F.R. § 303.523.

NOTES

48-2 (continued)
cost; and 34 C.F.R. § 303.520(b)(3)(ii), which requires the state to assure that "[t]he inability of the parents of an eligible child to pay for services will not result in the denial of services to the child or the child's family."

49-1 Policy #49 implements (and is required by) 34 C.F.R. § 303.525, which obliges the lead agency to ensure that "services are provided ... in a timely manner, pending the resolution of disputes among public agencies or service providers,"[12] and 34 C.F.R. § 303.523(c)(1), which mandates that the lead agency enter into interagency agreements that "include procedures for achieving a timely resolution of ... disputes about payments for a given service".[13]

49-2 Parents are not parties to the interagency dispute-resolution proceedings required by 34 C.F.R. § 303.523, as they have no legal standing to insist that any particular agency pay for the services being provided their child or family.

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[12] *See also* 20 U.S.C. § 1476(b)(9)(D).

[13] *See also* 34 C.F.R. § 303.520(c)(state must implement a mechanism "to ensure that no services that a child is entitled to receive are delayed or denied because of disputes between agencies regarding financial or other responsibilities").

Mediation

RECOMMENDED POLICIES

50. States should develop mediation programs to supplement the formal hearing system.

a. Mediation is an informal process in which an impartial person helps parties in conflict resolve their differences and find a solution satisfactory to all sides. The agreement developed is reduced to writing, and the parties pledge to comply with it. However, they are under no legal compulsion to do so.

b. A formal hearing is a court-like process in which the parties present evidence to a hearing officer, who renders a decision based on the officer's understanding of the facts and the law at issue. Decisions by a hearing officer are in writing and are binding unless appealed through proper channels.

NOTES

50-1 Policy #50 distinguishes mediation from a formal hearing. The definitions are adapted from MEDIATION IN SPECIAL EDUCATION: A RESOURCE MANUAL FOR MEDIATORS, National Association of State Directors of Special Education (1982). This resource guide is available from NASDSE, 2021 K Street N.W. #315, Washington D.C. 20006; telephone (202) 296-1800.

50-2 Additional resources on mediation are available from:

a. The Justice Center of Atlanta, Inc., 976 Edgewood Avenue N.E., Atlanta, Georgia 30307; telephone (404) 523-8236 (has particular experience with special education systems).

b. The Standing Committee on Dispute Resolution of the American Bar Association, 1800 M Street N.W., Suite 200-S, Washington D.C. 20036; telephone (202) 331-2258 (offers a clearinghouse service and technical assistance for ABA members).

c. The National Institute for Dispute Resolution, 1901 L Street N.W., Suite 600, Washington D.C. 20036; telephone (202) 466-4764 (offers materials and referrals; call Linda Work, Program Associate).

Mediation (continued)

RECOMMENDED POLICIES

51. Parents should be free to choose mediation, a formal hearing or both to resolve disputes about Part H assessments, evaluations and services.

a. Parents may not be required to participate in mediation as a condition of having a formal hearing.

b. Parents should be free to request mediation services at any time before, during or after a formal hearing.

c. When the parents choose to pursue both mediation and a formal hearing, the formal hearing must be held and a decision rendered within the time limits prescribed by federal law, unless the parents consent to an extension of time.

d. The state may permit agencies and providers to request mediation services to resolve disputes with parents. However, parents must be free to accept or reject participation in such mediation.

NOTES

51-1 The regulations permit but do not require states to give parents the opportunity to resolve complaints through a mediation procedure.[14] We strongly urge states to afford parents the option of mediating complaints. Parents' complaints frequently can be resolved more swiftly, at less cost and with substantially less stress and more cooperation through mediation than through a formal hearing.

51-2 In our view, the state may permit public agencies and private providers to ask parents to mediate a dispute. However, when such a request is made, the parents must be informed of their right to refuse to participate in mediation[15] and, if applicable, their right to a formal hearing.

51-3 In our view, parents should have the option of requesting mediation services at any time before, during or after a formal hearing, until the decision of the hearing officer is upheld or denied in a judicial appeal.

51-4 The Part H regulations make clear that parents may not be required to mediate a complaint as a condition of having a formal hearing.[16] In addition, if parents request a formal hearing, either before or while engaged in mediation, the hearing must be held and a final decision rendered within the time limit prescribed by law.[17] However, the time limit may be extended with the parents' consent.

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[14] Note 2 to 34 C.F.R. § 303.420.
[15] *See id.*
[16] Note 2 to 34 C.F.R. § 303.420.
[17] *Id.*

The Conduct of Formal Hearings

RECOMMENDED POLICIES

52. Formal hearings must be conducted as follows:

a. Hearings must occur at times and places reasonably convenient for parents.

b. Parents must have the right to compel the attendance of witnesses and the production of documents.

c. Parents must have the right to prohibit the introduction of evidence that was not disclosed to them at least five days before the proceeding.

d. Parents must have the right to cross-examine opposing witnesses.

e. Parents must have the right to be represented by a lawyer or other advocate.

f. When parents request a hearing, they should be informed of free or low-cost legal or advocacy assistance that may be available to them, and be given a list of organizations that provide or arrange such assistance (e.g., parent training and information centers, protection and advocacy programs and legal aid organizations).

g. Hearing officers must have knowledge of relevant law, of the Part H system, and of the needs of and services available for eligible children and their families.

h. Hearing officers must be impartial.

1) They may not be employed by any agency or program involved in the provision of early intervention services or in the care of the child.

NOTES

52-1 The Part H regulations permit states to select between two different but overlapping standards for the conduct of formal hearings. The state may adopt the standards set out at 34 C.F.R. §§ 300.506-300.512 for due process hearings conducted pursuant to Part B of the Education of the Handicapped Act or it may conduct formal hearings in accordance with standards specified in the Part H regulations.[18] Regardless of which set of standards it selects, however, formal hearing procedures must, in our view, comply with policy #52, with only two exceptions. As noted below, the practice in policy #52(f) (advising parents about free and low- cost advocacy assistance) is not legally required in certain limited circumstances. In addition, states are not obliged to adopt the practice in policy #52(l) of awarding prevailing parents an attorney's fee.

a. The policy in subparagraph (a) is required by 34 C.F.R. § 300.512(d)(standard for due process hearings conducted under Part B rules) and 34 C.F.R. § 303.423(a) (standard for hearings conducted in accordance with rules specified in Part H regulation).

b. The policy in subparagraph (b) is required by 34 C.F.R. § 300.508(a)(2)(Part B rule) and 34 C.F.R. § 303.422(b)(2) (Part H rule). Although the cited provisions refer only to the right to compel the attendance of witnesses, this right as a matter of law and of practice generally encompasses the right to require a witness to bring along specified documents.

c. The policy in subparagraph (c) is required by 34 C.F.R. § 300.508(a)(3)(Part B rule) and 34 C.F.R. § 303.422(b)(3) (Part H rule).

d. The policy in subparagraph (d) is required by 34 C.F.R. § 300.508(a)(2)(Part B

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[18] 34 C.F.R. § 303.420.

Formal Hearings (continued)

RECOMMENDED POLICIES

52. (continued)

2) They may have no other conflict of interest, either personal or professional, that might impair their objectivity (e.g., work for an agency that has a vested interest in the outcome of the questions presented for resolution at the hearing).

3) A person is not considered an "employee" of an agency or provider, as that term is used in (h)(1) above, if the person's responsibilities are limited to conducting hearings and otherwise implementing the complaint resolution processes required by 34 C.F.R. § 303.420.

i. The hearing process must be concluded (i.e., a hearing must be held and a decision rendered) within the time prescribed by law. States should adopt procedures for expediting both hearings and decisions when a child might suffer serious harm if services in dispute are delayed or denied.

j. Hearing officers must render written explanations of their decisions that include findings of facts and conclusions of law.

1) Where the need for a decision is urgent (e.g., if a child might suffer harm from the delay or denial of ser-

NOTES

52-1 (continued)

rule) and 34 C.F.R. § 303.422(b)(2) (Part H rule).

e. The policy in subparagraph (e) is required by 34 C.F.R. § 300.508((a)(1)(Part B rule) and 34 C.F.R. § 303.422(b)(1) (Part H rule).

f. States that elect to conduct hearings according to Part B procedures are bound to comply with the policy in subparagraph (f).[19] States that elect to conduct hearings according to the procedures specified in the Part H regulations also must comply with the policy in most circumstances. Most, if not all, parents who request a formal hearing will have already been assigned a case manager. Under the Part H regulations, the case manager must inform parents of "the availability of advocacy services."[20] This requirement applies with special force, we believe, when the parents request a formal hearing. Also, the Part H regulations require Part H systems to have a central directory of information about "[p]rofessional and other groups that provide assistance to [eligible] children ... and their families,"[21] including advocacy groups.[22]

g. The Part B regulations do not address the qualifications of hearing officers other than in the context of conflict of interest rules. However, a hearing officer cannot adequately perform his or her job without knowledge of the matters identified in subparagraph (g). We therefore believe this policy is implicitly required by Part B.[23] The Part H regulations require that hearing officers have "knowledge about the

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[19] 34 C.F.R. § 300.506(c)(parents must be informed of "any free or low-cost legal and other relevant services").

[20] 34 C.F.R. § 303.6(b)(5).

[21] 34 C.F.R. § 303.301(a)(3).

[22] Note to 34 C.F.R. § 303.301.

[23] *Cf.* 34 C.F.R. § 300.507(c)(each public agency must keep a list of hearing officers, which includes a statement of the qualifications of each officer).

Formal Hearings (continued)

RECOMMENDED POLICIES

52 . (continued)

vices in dispute), a decision may be rendered orally at the conclusion of the hearing and a written decision filed later.

2) When the procedure described in (j)(1) above is followed, the parents must be able to rely on the oral decision rendered. In addition, where parents have a right to administratively appeal a hearing decision (as may occur in states that elect to conduct formal hearings under Part B procedures), parents should be given ample time after the written decision is rendered to pursue an administrative appeal.

k. Parents have the right to a written or electronic verbatim transcript of the hearing.

l. Parents who prevail in a formal hearing should be entitled to recover attorney's fees.

NOTES

52-1 (continued)

provisions of [the Part H law and regulations] and the needs of, and services available for, eligible children and their families."[24] The Part H regulations do not specifically require knowledge of "relevant law" other than Part H. However, we believe that, as a matter of both law and practice, hearing officers must be familiar with relevant law other than Part H, including FERPA, law regarding state-created entitlements to particular services, and law regarding the conduct of administrative proceedings.

h. Federal constitutional law[25] as well as both the Part B and the Part H regulations[26] require that hearing officers be impartial. Both sets of regulations forbid certain persons from serving as hearing officers, finding them to be *ipso facto* partial.

1) The Part B regulations bar from serving as a hearing officer any "employee of a public agency which is involved in the education or care of the child."[27] As applied to the Part H context, this provision, in our view, bars from serving as a hearing officer an employee of any public agency involved in providing early intervention services to the child whose parents initiated the hearing or to the child's family. In addition, the Part B regulations bar from serving as a public hearing officer any "person having a personal or professional interest which would conflict with his or her objectivity"[28] In our view, such a conflict would arise in

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[24] 34 C.F.R. § 303.421(a)(1).

[25] *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

[26] 34 C.F.R. § 300.507 (Part B) and 34 C.F.R. § 303.421(a)(Part H).

[27] 34 C.F.R. § 300.507(a)(1).

[28] 34 C.F.R. § 300.507(a)(2).

Formal Hearings (continued)

NOTES

52-1 (continued)

the Part H context if the hearing officer was actually providing services to the child or the child's family, was employed by a public agency or a private provider serving the child or family, or was employed by a public agency or a private provider involved in the delivery of early intervention services.[29]

2) The Part H regulations forbid from serving as a hearing officer any "employee of any agency or program involved in the provision of early intervention services or care of the child,"[30] The Appendix to the Part H regulations explains that this provision applies to employees of *any* agency or program involved in the provision of early intervention services, regardless whether the agency or program provides services to the child involved in the complaint.[31] In addition, the Part H regulations forbid from serving as a hearing officer any person with another "personal or professional interest that would conflict with his or her objectivity."[32]

Both sets of regulations make clear that a person is not be considered an "employee" of a public agency if the person's responsibilities are limited to conducting hearings and otherwise implementing the complaint resolution processes required by 34 C.F.R. § 303.420.[33]

i. Under Part B, a decision concerning the parents' complaint must be rendered

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[29] *See* 34 C.F.R. § 303.421(b)(1)(i)(the standards for hearings conducted under rules specified in Part H regulations forbid from serving as a hearing officer any "employee of any agency or program involved in the provision of early intervention services or [in the] care of the child"); Appendix A to Part H regulations, discussion of § 303.421, 54 *Federal Register* 26343 (June 22, 1989).

[30] 34 C.F.R. § 303.421(b)(1)(i).

[31] Appendix A to Part H regulations, discussion of § 303.421, 54 *Federal Register* 26343 (June 22, 1989).

[32] 34 C.F.R. § 303.421(b)(1)(ii).

[33] 34 C.F.R. § 300.507(b)(Part B); 34 C.F.R. § 303.421(b)(2) (Part H).

Formal Hearings (continued)

NOTES

52-1 (continued)

within 45 days after the state receives the parents' request for a hearing.[34] The Part H regulations require a decision within 30 days after receipt of the parents' request for a hearing.[35] Neither set of regulations explicitly requires states to adopt procedures for expediting hearings and decisions in exceptional circumstances. However, we believe parents are entitled to an expedited hearing and decision when their child might suffer serious harm if services in dispute are delayed or denied.

j. Both the Part B and Part H regulations require hearing officers to render written decisions that include findings of facts.[36] Judicial decisions mandate, in the Part B context, that hearing officers' decisions also include conclusions of law.[37] These decisions, we believe, have equal relevance in the Part H context. In our view, Part H hearing officers are therefore legally required to include written conclusions of law in their decisions.

Neither the Part B nor the Part H regulations forbid the procedure described in subparagraph (j)(1). When such a procedure is used, parents must be able to rely on the oral decision of the hearing officer.[38]

In states that have elected to conduct formal hearings under Part B procedures, parents are permitted, under certain circumstances, to administratively appeal a hearing decision to the lead agency.[39] Where the procedure in subparagraph (j)(1) is used, parents should be given ample time

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[34] 34 C.F.R. § 300.512(a).

[35] 34 C.F.R. § 303.423(b).

[36] 34 C.F.R. § 300.508(a)(5) (Part B); 34 C.F.R. §§ 303.421(a)(2)(ii) & 303.422(b)(5) (Part H).

[37] *Kotowitz v. Miss. State Bd. of Educ.*, 630 F. Supp. 925 (S.D. Miss. 1986); *Vogel v. School Bd. of Montrose*, 491 F. Supp. 989 (W.D. Mo. 1980).

[38] *See Town of Burlington v. Mass. Dept. of Education*, 736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

[39] *See* 34 C.F.R. § 300.510(a) (under Part B, parents may appeal a hearing decision to the state education agency if the formal hearing was conducted by another public agency).

Formal Hearings (continued)

NOTES

52-1 (continued)

after the written decision is rendered to pursue an administrative appeal.

k. The policy in subparagraph (k) is required by 34 C.F.R. § 300.508(4) (Part B) and 34 C.F.R. § 303.422(b)(4) (Part H).

l. Part H does not provide for the award of attorney's fees to parents who prevail in an administrative hearing. However, in certain circumstances, parents have the option of resolving a complaint about conduct toward their infant or toddler through either the Part H hearing system or the Part B due process system (i.e., the formal hearing system for administratively resolving complaints regarding the Part B system). Parents who chose the Part B system and who prevail are entitled to recover an attorney's fee under applicable Part B law.

Parents have the option of invoking either the Part H hearing system or the Part B due process system to resolve their complaint when (i) they live in a state that has mandated Part B services for children under age three and they complain of the denial of a service or right to which they or their child are entitled under the state mandate; or (ii) their complaint involves a matter within the scope of the "child find" provisions of Part B.[40]

The question of what Part H assessment and evaluation activities are part of Part B "child find" is a difficult one, which the Task Force has not attempted to resolve. However, both the notes and Appendix A to the Part H regulations suggest that the overlap is substantial. Indeed, one possible reading of the notes and Appendix is that all Part H assessment and evaluation ac-

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[40] *See* Appendix A to the Part H regulations, discussion of attorney's fees, 54 *Federal Register* 26342 (June 22, 1989).

Formal Hearings (continued)

NOTES

52-1 (continued)

tivities are part of Part B "child find."[41] If this is the case, then parents have the right to invoke either the Part B due process system or the Part H formal hearing system to resolve any complaint they may have about the Part H system's assessment or evaluation of their child. And, if they choose the Part B due process system and prevail, they are entitled to an attorney's fee.[42]

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[41] *See* Note 2 to 34 C.F.R. § 303.404 (Part B procedures may be used to override parents' refusal to consent to an evaluation of their child's eligibility for Part H services); Appendix A to the Part H regulations, discussion of attorney's fees, 54 *Federal Register* 26342 (June 22, 1989) (suggesting an identity between Part H evaluation activity and Part B "child find" activity).

[42] 20 U.S.C. § 1415(e)(4).

Other Requirements Applicable to the Formal Hearing System

RECOMMENDED POLICIES	NOTES
53. If parents are required to request a formal hearing in writing, they must be informed of this requirement when notified of their rights.	53-1 In our view, policy #53 is mandated by the Part H regulations. The Part H regulations require that "[w]ritten prior notice be given parents ... before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family."[43] Under the regulations, such notice must include "sufficient detail to inform the parents about ... [a]ll procedural safeguards that are available under [Part H]."[44] To fulfill this obligation, we believe, parents must be informed of any requirement that a request for a hearing be made in writing. In addition, we believe that parents should be informed of such a requirement whenever they are notified of their rights.
54. No one other than parents may be permitted to invoke the formal hearing process for resolving complaints.	54-1 The Part H statute and regulations authorize only parents to invoke the formal hearing process to resolve complaints – with one possible exception. The Part H regulations indicate that the state may use Part B due process procedures to override a parent's refusal to consent to an initial evaluation of an infant or toddler.[45] As indicated in the notes to recommended policy #5 above, we believe that neither Part H nor Part B permits the use of Part B procedures for this purpose. In addition, we believe that the use of Part B procedures to override a parents' refusal to consent to an evaluation would violate the U.S. Constitution.

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[43] 34 C.F.R. § 303.403(a).
[44] 34 C.F.R. § 303.403(b)(3).
[45] Note 2 to 34 C.F.R. § 303.404.

Publication of Hearing Decisions

RECOMMENDED POLICIES	NOTES
55. Decisions rendered in the hearing process, with personal identifying information deleted, should be sent to the Interagency Coordinating Council (ICC).	55-1 The Part H statute and regulations do not specifically mandate that states adopt policy #55.[46] However, in our view, it is essential for the ICC to be aware of the number, type and veracity of complaints made by parents in order to fulfill its obligations to "[a]dvise and assist the lead agency in the development and implementation of the policies that constitute the statewide [Part H] system,"[47] and "[a]ssist the lead agency in the effective implementation of the statewide system by ... [s]eeking information from ... parents, and others about ... policies that impede timely service delivery."[48]
56. A central file of hearing decisions should be maintained by the lead agency. Copies of these decisions, with all information identifying children and families excised, should be accessible to the public.	56-1 Policy #56 is not legally mandated. However, we strongly urge states to adopt such a policy to assist parents in exercising their rights.

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[46] *Compare* 34 C.F.R. §300.508(5) (requiring that decisions by Part B hearing officers, with personally identifiable information deleted, be sent to the state advisory panel).

[47] 34 C.F.R. § 303.650(a)

[48] 34 C.F.R. § 303.650(c)(1).

Services While a Complaint Is Being Resolved

RECOMMENDED POLICIES

57. During the pendency of proceedings (including mediation) to resolve a complaint, unless the state and parents agree otherwise, the child and family must continue to receive the early intervention services that were being provided them before the complaint was filed.

NOTES

57-1 Policy #57 implements the requirement in the Part H statute that "[d]uring the pendency of any proceeding . . .involving a complaint, unless the [state] and the parents . . . otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided."[49] The Part H statute and regulations are silent on the question whether the child's family must also continue to receive services while a complaint is pending. We strongly believe the family should and have so recommended in policy #57.

57-2 The Part H statute and regulations mandate that "appropriate" early intervention services continue to be provided while a complaint is being resolved.[50] Although it is possible to read this mandate as allowing the Part H system to discontinue during the pendency of a complaint services it considers "inappropriate," we believe such an interpretation would be inconsistent with Congress' intent in enacting Part H. It seems plain that Congress modeled the mandate after (and intended it to parallel) the "stay-put" provisions of Part B,[51] which requires the state to continue the services being provided a child before the complaint was filed.[52] Accordingly, we believe the stay-put provision of Part H should be interpreted as including a similar requirement.[53]

57-3 Although the issue is not specifically addressed in the Part H statute or regulations, we believe the state should continue services to a child or family not only during

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[49] 20 U.S.C. § 1480(7); *see* 34 C.F.R. §303.425(a).

[50] 20 U.S.C. § 1480(7); 34 C.F.R. § 303.425.

[51] 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.513.

[52] *See Honig v. Doe*, 484 U.S. 305 (1988).

[53] Although the state may not limit services while a complaint is pending, parents remain free to refuse services they consider inappropriate. *See* footnote 3 on page 35 (right to refuse services); *Town of Burlington v. Mass. Dept. of Education*, 471 U.S. 359 (1985) (parents may refuse inappropriate placement during pendency of a Part B complaint).

Services While a Complaint Is Being Resolved

RECOMMENDED POLICIES	NOTES
	57-3 (continued) resolution of a formal complaint but also while awaiting the outcome of mediation initiated by the parent. Unless a state adopts this even-handed approach, it will discourage parents from selecting mediation over a formal hearing. Parents will be forced to request a formal hearing in addition to or instead of mediation if they desire the protection offered by a "stay-put" policy.
58. If the complaint involves an application for initial services, the child and family must receive all services that are not in dispute.	58-1 Policy #58 implements the mandate in the Part H statute that if a complaint involves an application for initial services, "the child ... shall receive the services not in dispute."[54] The Part H statute and regulations are silent as to whether the family must also receive services that are not in dispute. We strongly believe the family should and so recommend in policy #58.

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[54] 20 U.S.C. § 1480(7); *see* 34 C.F.R. 303.425(b).

Filing an Action in Court

RECOMMENDED POLICIES

59. Parents who are aggrieved by the final decision of the formal hearing system (e.g., if the decision denies them a right or service they sought for themselves, their child or their family) may challenge the decision by filing a lawsuit in either federal or state court.

NOTES

59-1 Policy #59 is mandated by both the Part H statute [55] and regulations.[56]

59-2 States that have elected to conduct formal hearings under Part B procedures must, under certain circumstances, permit parents to administratively appeal a decision issued after a formal hearing.[57] Generally, parents must complete the administrative appeal process before filing an action in court.[58]

59-3 The parents' suit may be directed against the lead agency and against any other public agency responsible for the conduct about which the parents complain.

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[55] 20 U.S.C. § 1480(1)

[56] 34 C.F.R. § 303.424.

[57] *See* 34 C.F.R. § 300.510(a) (under Part B, parents may appeal a hearing decision to the state education agency if the formal hearing was conducted by another public agency).

[58] *E.g., Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981).

Additional Procedures for Resolving Complaints

RECOMMENDED POLICIES

60. In addition to ensuring the operation of a system for conducting formal hearings, the lead agency must itself have an administrative system for resolving complaints that a public agency (including the lead agency and the ICC) or a private service provider has violated one or more requirement of the Part H statute or regulations. This system must ensure that:

a. An independent on-site investigation of a complaint is conducted when the lead agency determines that such an investigation is necessary to properly resolve the complaint;

b. The complaint is resolved within 60 days of its receipt, unless the lead agency determines that exceptional circumstances warrant an extension of the 60-day time limit; and

c. Complainants have a right to request that the U.S. Secretary of Education review the final decision of the administrative system.

NOTES

60-1 The lead agency is required by 34 C.F.R. §§ 303.510 and 303.512 to have an administrative system for resolving complaints that meets the requirements of policy #60.

RECOMMENDED POLICIES

61. The system must:

a. permit parents, other individuals and organizations to lodge complaints;

b. accept and resolve complaints about conduct affecting an individual child or family as well as complaints pertaining to a systemic failing; and

c. accept and resolve a parent's complaint, regardless of whether the parents are also seeking resolution of the complaint through the formal hearing system.

NOTES

61-1 The lead agency is required to operate the system in conformity with policy #61.

a. Under the Part H regulations, the administrative system must accept complaints from any "individual."[59] Thus parents, employees of public agencies and private providers, and individuals without a direct stake in the Part H system are all entitled to lodge complaints with the system. The regulations also require that an "organization," including a parent advocacy or legal advocacy organization, be permitted to lodge complaints with the system.[60]

b. The Part H regulations require that the lead agency's system resolve "any complaint that one or more requirements of [the Part H statute or regulations] are not being met,"[61] including both complaints limited to the particular circumstances of an individual child or family and complaints that address systemic failings. Complaints concerning an individual child or family may be filed by the child's parents, by other family members or by a person unrelated to the child or family.[62] A complaint addressing systemic problems need not identify any individual child or family as long as facts are presented to support the complaint.[63]

c. Neither the Part H statute nor the Part H regulations authorize the lead agency to decline or refuse to resolve a complaint that is also the subject of a formal hearing.

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[59] 34 C.F.R. § 303.511.

[60] *Id.*

[61] 34 C.F.R. § 303.510(a)(emphasis added).

[62] *See* 34 C.F.R. § 303.511 (complaint that a provision of the Part H statute or regulations is being violated may be filed by "any individual or organization").

[63] *See* 34 C.F.R. § 303.511(b) (requiring only that complaints include "facts upon which the complaint is based").

Additional Procedures for Resolving Complaints (continued)

RECOMMENDED POLICIES

62. The system should:

a. accept oral as well as written complaints. The lead agency should put oral complaints in writing and then process them exactly as it processes complaints that were originally filed in writing;

b. assist parents and others to lodge complaints by, among other things:

  1) offering them technical assistance in framing their complaint; and

  2) informing them of individuals and organizations who provide free or low-cost legal or other assistance to persons who wish to lodge a complaint (such as parent training and information centers, protection and advocacy programs and legal aid organizations).

c. develop specific criteria and procedures for:

  1) determining when an on-site investigation is needed;

  2) interviewing complainants or their representative as part of the fact-finding process;

  3) permitting complainants and their representatives to participate in the fact-finding process by submitting relevant evidence, questioning witnesses or other means; and

  4) permitting extensions of time under policy #60(b) above.

d. issue a written decision that includes a summary of the evidence considered by the lead agency, findings of

NOTES

62-1 Lead agencies are not legally required to comply with policy #62. However, we strongly urge them to do so. State education agencies (the "lead" agencies in the Part B program) are required to have an administrative system for resolving complaints similar to the one described in 34 C.F.R. §§ 303.510-.512.[64] The performance of the system in many states has been disappointing. Technical requirements for the filing of complaints have stymied parents' and others' efforts to use the system. Investigations are often shoddily performed. And decisions frequently lack written rationales, making it difficult for parents and others to monitor the system. The practices recommended in policy #62 are designed to prevent similar problems from developing in the counterpart system required by 34 C.F.R. §§ 303.510-.512.

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[64] 34 C.F.R. § 300.3 (applying to the Part B program the Education Department General Administrative Regulations [EDGAR], which contain such a requirement).

RECOMMENDED POLICIES

62. (continued)
fact and conclusions of law, and a determination of the merit of each allegation of unlawful conduct raised in the complaint.

63. Parents must be given information about this system when notified of their rights.

NOTES

63-1 In our view, policy #63 is mandated by the Part H regulations. The Part H regulations require that "[w]ritten prior notice be given to the parents ... before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family."[65] Under the regulations, such notice must include "sufficient detail to inform the parents about ... [a]ll procedural safeguards that are available under [Part H]."[66] To fulfill this obligation, we believe, parents must be informed of their right to utilize the lead agency system for resolving complaints provided for in 34 C.F.R. § 303.510-.512. In addition, we believe that parents should be informed of the availability of this system whenever they are notified of their rights.

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[65] 34 C.F.R. § 303.403(a).

[66] 34 C.F.R. § 303.403(b)(3).

Additional Procedures for Resolving Complaints (continued)

RECOMMENDED POLICIES

64. Information about findings made and action taken by the administrative system should be made available to both the Interagency Coordinating Council (ICC) and the public. Accordingly, the lead agency should:

a. send to the ICC reports, excluding information identifying children and families, of findings made and actions taken by the system; and

b. maintain a central file reflecting all findings made and actions taken by the system. A copy of this file, with all identifying information deleted, should be accessible to the public.

NOTES

64-1 The Part H statute and regulations do not specifically mandate that states follow policy #64(a). However, we believe it is essential for the ICC to be aware of the number, type, and veracity of complaints filed with the lead agency if it is to fulfill its obligations to "[a]dvise and assist the lead agency in the development and implementation of the policies that constitute the statewide [Part H] system,"[67] and "[a]ssist the lead agency in the effective implementation of the statewide system by ... [s]eeking information from service providers, case managers, parents, and others about ... policies that impede timely service delivery."[68]

64-2 Policy #64(b) is not legally mandated. However, we strongly urge states to adopt such a policy to assist parents and other members of the public in monitoring the Part H program's compliance with its legal mandates.

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[67] 34 C.F.R. § 303.650(a).

[68] 34 C.F.R. § 303.650(c)(1).

Appendices

APPENDIX A

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APPENDIX B

Recommended Policies

CONSENT TO ASSESSMENT, EVALUATION AND SERVICES

Definition of "Informed Consent"

1. Parental consent is "informed" when:

a. The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;

b. The parent understands and agrees in writing to the carrying out of the activity for which parental consent is sought, and the consent describes that activity and lists records (if any), including physical documents and recorded information, that will be released and to whom; and

c. The parent understands that the granting of consent is voluntary and may be revoked at any time.

When Consent to an Evaluation or Assessment Is "Informed"

2. A parent's consent to an evaluation or assessment is "informed" if:

a. The parent understands the purpose of the evaluation or assessment and the procedures to be employed (i.e., what information is desired, why it is desired and how it will be obtained). If a family assessment is to be conducted, this must be made explicit. The parent's written consent should describe the assessment or evaluation procedures the parent has authorized;

b. The parent understands any burdens a parent or family will bear as a result of the assessment or evaluation (e.g., whether parents must provide transportation, possible impact on the family of home-based procedures, effects on insurance limits); and

c. The parent understands the possible adverse consequences of refusing to consent to an assessment or evaluation or to proposed assessment or evaluation procedures (e.g., inability to establish child's eligibility for Part H services).

When Consent to Services Is "Informed"

3. A parent's consent to the provision of services is "informed" if:

a. The parent understands the purpose of each service to be provided and how the service will be provided. The parent's written consent should indicate each service the parent has authorized;

b. The parent understands the financial charges (if any) that parents or family will incur for the services. The parent's written consent should indicate each charge the parent has authorized;

c. The parent understands any burdens that parents or family will bear as a result of each proposed service (e.g., whether parents must provide transportation, possible impact on the family of home-based services, possible effects on insurance limits); and

d. The parent understands the possible adverse consequences of refusing proposed services (e.g., worsening of the child's condition).

Obtaining Parents' Signature on the IFSP

4. Parents should be asked to sign the Individualized Family Service Plan ("IFSP") as evidence of their informed consent to the provision of the services outlined in the plan. The IFSP form should allow the parents to indicate consent for some or all of the proposed services. A refusal to sign the IFSP should be treated as a refusal to consent to the services outlined in the plan.

Obtaining Informed Consent Before Initial Evaluation and Assessment of a Child, a Family Assessment, and the Initial Provision of Services

5. Parents' informed consent must be obtained before:

a. conducting the initial evaluation and assessment of a child; and

b. conducting a family assessment; and

c. initiating the provision of services to a child or family (i.e., at the time the initial Individualized Family Service Plan is developed).

Obtaining Informed Consent Before Subsequent Evaluations and Before Changes in Identification, Services and Placement

6. Unless parents have explicitly waived the requirement, their informed consent should also be obtained before:

a. conducting an evaluation subsequent to the initial evaluation; or

b. changing the identification or the placement of a child or the services provided a child or family.

Permitting Parents to Consent to Some Procedures and Services While Rejecting Others

7. The state may not refuse to perform an evaluation or assessment procedure or deny a service because the parents have refused to consent to another procedure or service they do not desire.

a. Parents may selectively consent to proposed procedures for evaluating their child or assessing their child or family (i.e., the parents may consent to some procedures and reject others).

b. When the services recommended for a child or family are more comprehensive than desired by the parents, the parents may consent to some services and reject others.

Encouraging Parents' Consent to Recommended Assessment and Evaluation Procedures and to Recommended Services

8. The state may pursue activities designed to encourage parents to consent to recommended assessment or evaluation procedures and to recommended services that they have refused.

a. These activities may include:

1) providing to parents relevant literature or other materials;

2) offering parents peer counseling to enhance their understanding of the value of early intervention and to allay their concerns about participation in Part H programs; and

3) periodically renewing contact with parents, on an established time schedule, to determine if they have changed their minds about the desirability of recommended procedures or services.

b. The state may not employ any form of coercion in attempting to persuade parents to accept recommended evaluation or assessment procedures or recommended services, except as permitted in policy #9 below.

Overriding Parents' Refusal to Consent

9. There may be circumstances when the parents' refusal to consent to an evaluation or assessment procedure or to a service would amount to child abuse or child neglect under state law. In such circumstances, and *only* in such circumstances, the state may initiate a proceeding in a proper court to override the parents' refusal to consent. In such a proceeding, the state may seek either judicial appointment of a guardian empowered to consent on behalf of the child to the recommended procedures or services or, alternatively, state custody of the child, so that the state may consent on the child's behalf to recommended procedures or services. The first of these options is less intrusive on the parent's rights; accordingly, it is the preferred alternative.

a. A judicial proceeding should be initiated only in an emergency, as a last resort, and after all other avenues (including peer counseling) have been tried and have failed.

b. Neither the state nor a provider nor anyone else may use an administrative procedure, including the administrative complaint resolution procedure within the Part B and Part H programs, to compel parental conduct contrary to parents' wishes.

NOTICE OF PARENTS' RIGHTS AND OF PROPOSED ACTIONS

Rights of Which Parents Should Be Notified

10. Parents should be informed that they have the following rights:

a. the right to a timely, multidisciplinary assessment;

b. the right, if eligible, to appropriate early intervention services for their child and family;

c. the right to refuse evaluations, assessments and services;

d. the right to notice before a change is made or refused in the identification, evaluation or placement of the child, or in the provision of services to the child or family;

e. the right to confidentiality of personally identifiable information;

f. the right to review and correct records;

g. the right to be invited to and to attend and participate in all meetings in which a decision is expected to be made regarding a proposal to change the identification, evaluation or placement of the child or the provision of services to the child or family;

How Parents Should Be Notified of Their Rights

11. Parents should be notified of their rights in the following manner:

a. Both oral and written notice should be provided at multiple points in the family's involvement with the Part H system. Repetition is necessary because the information is complex, and parents may need to hear and discuss their rights several times in order to fully understand them. At a minimum, both an oral and written notice of rights should be provided when:

1) the family has its initial contact with the early intervention system;
2) the initial evaluation and assessment is proposed or refused;
3) the eligibility determination is made;
4) the IFSP is being developed or reviewed; and
5) a change in services or placement is proposed or refused.

b. The notice should be in language and by means of communication understandable to the parent.

c. Oral notice should be provided in the natural flow of conversation and in the context of emphasizing parental freedom and choice in the Part H system.

d. Information concerning parental rights should be included in the state's public awareness program.

12. Parents should be informed of their rights relating to the Part B system (the system of special education services for preschool and school age children mandated by Part B of the Education of the Handicapped Act) before their child's "graduation" from the Part H system. The information should be provided far enough in advance of the child's "graduation" to permit the parents to ensure that the child, if eligible, receives appropriate Part B services in a timely fashion. Parents should be informed, as well, of their rights relating to other services identified in the child's transition plan.

Providing Notice Before Significant Action Is Taken

13. Parents must receive timely notice in writing before a public agency or a service provider proposes or refuses to initiate or change the identification, evaluation or placement of their child or the provision of early intervention services to the child or family.

14. The notice must be in language understandable to the parent receiving it and provide sufficient detail to fully inform the parent about:

a. the action that is being proposed or refused;

b. the reasons for proposing or refusing the action, including a description of other options considered and the reasons for rejecting the options;

c. the information upon which the proposal or refusal is founded, including a description of each record or report used as a basis for the proposal or refusal;

d. if applicable, the parent's right to refuse to consent to the action, including any consequences for parent or child if the parent refuses to consent;

e. the parent's right to appeal the proposal or refusal to act, including a description of 1) the method of making such an appeal, 2) whether activities to which the parents object will be delayed pending the appeal, and 3) whether activities sought by the parent will be implemented pending the appeal; and

f. all other procedural safeguards available under the Part H statute and regulations.

Notice in Parents' Native Language

15. Notice must be provided in the parents' native language unless it is clearly not feasible to do so. States should adopt policies specifically identifying the exceptional circumstances in which it is "clearly not feasible" to give notice in the parents' native language. (A state should rarely, if ever, fail to provide notice in the parents' native language.)

Action to Be Taken When Written Notice Is Not Effective

16. If a parent's native language or usual mode of communication is not a written language (e.g., if the parent has a communication disability or is functionally or totally illiterate), steps must be taken to ensure that:

a. Any notice required to be provided in writing to the parent is translated orally to the parent in the parent's native language or provided in the mode of communication normally used by the parent (e.g., sign language, braille or oral communication);

b. The parent understands the notice; and

c. There is written evidence that the requirements of (a) and (b) have been met.

RIGHT TO REVIEW AND CORRECT RECORDS

Definition of Record

17. A "record" is any information, recorded in any way, maintained by an agency or service provider (whether public or private) or by any party acting for an agency or service provider.

18. "Records" include files, evaluations, reports, studies, letters, telegrams, minutes of meetings, memoranda, summaries, interoffice or intraoffice communications, memoranda reflecting oral conversations, handwritten or other notes, charts, graphs, data sheets, films, videotapes, slides, sound recordings, discs, tapes and information stored on microfilm or microfiche or in computer-readable form.

Records to Which Parents Have Access

19. Except as provided in #21 below, parents must have access to all records regarding their child or family that relate to:

a. screening, evaluation, assessment, eligibility determinations and the development and implementation of the IFSP;

b. individual complaints dealing with the child or family; and

c. any other area under the Part H regulations involving records about the child and the child's family.

20. Parents' access may not be restricted based on the identity of the agency or provider maintaining the records. Parents are entitled to access to records maintained by the lead agency, another public agency or a service provider, whether public or private.

21. States may adopt policies denying parents access to the following records:

a. records of service, supervisory and administrative personnel that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

b. records of a law enforcement unit of a public agency or private provider, but only if: the unit's records are maintained solely for law enforcement purposes; the unit's records are disclosed only to law enforcement officials of the same jurisdiction; the unit's records are maintained separate from other records of the agency or provider; and other records of the agency or provider are not disclosed to the unit; and

c. records relating to an individual who is employed by an agency or provider that: are made and maintained in the normal course of business; relate exclusively to the individual in that individual's capacity as employee; and are not available for use for any other purpose. This subparagraph does not apply to records relating to a parent who is employed as a result of the parent's status as a recipient of services or as a result of the parent's child's receiving services.

Parents' Access Rights

22. When a parent asks to review a record, the agency or provider maintaining the record must comply with the request without unnecessary delay—in no event more than 14 days after the request is made. Priority should be given to parents' requests to review records in preparation for an IFSP meeting, a hearing or another time-sensitive event.

23. When records are requested in connection with a meeting regarding the IFSP or with a formal hearing to resolve a complaint (conducted pursuant to 34 C.F.R. § 303.420), the agency or provider shall provide the records prior to the meeting or hearing.

24. The right to review a record includes:
a. the right to a response to reasonable requests for explanations and interpretations of the record;
b. the right to obtain, free of charge, one copy of the record; and
c. the right to have a representative of the parent's choosing review the record.

25. An agency or provider may not charge a fee to search for or to retrieve a record.

Right to Correct Records

26. A parent may request that information in a record be amended (including that it be deleted) if:
a. It is inaccurate or misleading; or
b. It violates the privacy or other rights of the parent's child or family.

27. When a parent requests that information in a record be amended, the agency or provider maintaining the record must act on the request without unnecessary delay and in no event more than 45 days after the request is made.

28. If the agency or provider refuses to amend the information as requested, it must:
a. inform the parent of the refusal; and
b. advise the parent that she or he may appeal the refusal by invoking the administrative procedures of the Part H system for resolving parents' complaints (including formal hearings pursuant to 34 C.F.R. § 303.420, mediation where available or both).

29. If the parent chooses not to appeal, or if the parent loses the appeal (i.e., the information is not amended as a result of the appeal), the parent may place in the files of the agency or provider maintaining the contested record a corrective statement commenting on the information in the record and, if the parent has lost an appeal, setting forth the parent's reasons for disagreeing with the decision on appeal.
a. The statement must be maintained along with the contested record; and

b. If the record or the information about which the parent has complained is ever disclosed by the agency or provider to any party, the statement must also be disclosed to that party.

Information About What Records Agencies and Providers Maintain and Whom to Contact for Access to Them

30. The lead agency, upon request, must inform parents of the types and locations of records collected, maintained or used by public agencies and private providers relating to:

a. screening, evaluation, assessment, eligibility determinations or the development and implementation of Individualized Family Service Plans;

b. individual complaints dealing with children or families; or

c. any other area under the Part H regulations involving records about children and families.

31. Each public agency and private provider must provide to parents, upon request:

a. a list of the types and locations of records collected, maintained or used by the agency or provider relating to:

1) screening, evaluation, assessment, eligibility determinations or the development and implementation of IFSPs;

2) individual complaints dealing with children or families; or

3) any other area under the Part H regulations involving records about children or families; and

b. the title and address of the person to whom requests to review such records should be made.

CONFIDENTIALITY

What Information Is Confidential

32. Personally identifiable information concerning a child, the child's parent or another family member is confidential.

33. Personally identifiable information includes but is not limited to:

a. the name of the child, the parent or other family member;

b. the address of the child, the parent or other family member;

c. a personal identifier, such as a social security number, of the child, parent or other family member;

d. a description of personal characteristics or other information that would make it possible to identify the child, the parent or other family member with reasonable certainty; and

e. information that would make the identity of the child, parent or other family member easily traceable.

Disclosure of Confidential Information

34. Except as provided in policies #35, 36 and 37, all disclosures of confidential information, including disclosures among agencies and providers, may be made only with the parents' informed consent.

35. A public agency, subject to policy #36 below, or a service provider may disclose confidential information, without prior parental consent, to its employees who have a legitimate need for access to the information.

36. Many states have umbrella human services departments (e.g., public departments of human services, human resources or health and rehabilitative services) with component agencies or units responsible for mental health, developmental disabilities, public health, public welfare and/or juvenile justice. Within such an umbrella department, each component agency or unit may, without prior parental consent, disclose confidential information to its own employees who have a legitimate need for access to the information. However, the component agencies or units may not share confidential information among themselves without the parents' prior informed consent, even where a legitimate need exists to do so. All exchanges of confidential information among component agencies or units, even within an umbrella department, must be authorized by the parents, except as provided by policy #37.

37. The state may adopt policies to permit disclosures of confidential information without prior parental consent when:

a. The disclosure is to authorized representatives of the Comptroller General of the United States, the U.S. Secretary of Education or a state agency responsible for the administration of the Part H program; the disclosure is in connection with an audit or evaluation of the Part H program or for ensuring the program's compliance with legal mandates; and the representatives to whom disclosure is made protect against further disclosures of the information and destroy the information when no longer needed;

b. The disclosure is to organizations conducting studies to develop, validate or administer predictive tests, to administer financial aid programs, or to improve Part H services; *and*:

  1) The study is conducted in a manner that does not permit personal identification of parents, children or family members by individuals other than representatives of the organization; *and*

  2) The disclosed confidential information is destroyed when no longer needed for the purposes for which the study was conducted;

c. The disclosure is to accrediting organizations to carry out their accrediting functions;

d. The disclosure is to comply with a judicial order or lawfully issued subpoena and a reasonable effort has been made by the disclosing agency or provider to notify the parents of the order or subpoena in advance of compliance;

e. The disclosure is in connection with a health or safety emergency, and the disclosure is necessary to protect the health or safety of a child or another person; or

f. The disclosure is to a parent and the information concerns either the parent or the parent's child.

38. State policies adopted pursuant to policy #37 above must require that:

a. Parents must be informed, as soon as practicable, of disclosures made without their prior consent under the circumstances in policy #37 (b-e); and

b. All such disclosures must be noted in the child's or family's records.

Minimum Safeguards for Releases Giving Broad Authority to Disclose Confidential Information to Other Parties

39. An agency or provider may request that parents provide a general release to disclose confidential information to others for legitimate purposes. However, when such a release is sought:

a. Parents must be informed of their right to refuse to sign the release. Notice of this right should appear on the release form;

b. The release form must list the agencies and providers and the individuals (by name or by position) to whom information may be given and specify the type of information that might be given to each;

c. Parents must be given the opportunity to limit the information provided under the release and to limit the agencies, providers and persons with whom information may be shared. The form must provide ample space for parents to express such limitations in writing;

d. The release must be revocable at any time. The release form must inform parents of this fact; and

e. The release must be time-limited. The release should be effective only until the initial IFSP is developed or, if an IFSP has already been developed, until the next IFSP review. (We anticipate that when the IFSP team meets to develop or review an IFSP, parents will be asked to review and, if appropriate, renew general releases they have previously executed.)

40. Each public agency and service provider should keep a log, accessible to the parents, of all disclosures of confidential information made pursuant to a general release executed by the parents.

Special Treatment of Sensitive Information

41. Special measures should be taken to protect the confidentiality of sensitive information (e.g., information relating to sexual or physical abuse, mental health treatment, HIV status or a child's parentage and any other information that the parents consider sensitive).

Release of Part H Records to Agencies and Providers Who Will Serve the Child After "Graduation" from the Part H System

42. a. With the parents' informed consent, confidential Part H records may be provided to the public schools when a child is enrolled in school. If the parents refuse to consent, confidential Part H records may not be intermingled with public school records, including records relating to special education, even if the state education agency ("SEA") is the Part H lead agency.

b. With the parents' informed consent, confidential Part H records may be provided to any other agency or provider that will serve the child after "graduation" from the Part H system.

Redisclosure of Confidential InformationObtained from Another Agency or Provider

43. An agency or provider may, without parental consent, redisclose confidential information obtained from another party only if such redisclosure is both:

a. permitted under the terms of the original disclosure made to the agency or provider; and

b. either:

1) permitted by state policies adopted pursuant to policy #37; or

2) consistent with a general release provided by the parents that meets the requirements of policy #39.

Seeking Confidential Information

44. A public agency or a service provider may not seek confidential information about a child or family, without the parents' informed consent, unless:

a. It is legally required to do so (e.g., to investigate alleged child abuse or neglect); or

b. Acquisition of the information is necessary to respond to a health or safety emergency.

45. An agency or provider may request that parents sign a general authorization bestowing broad authority upon the agency or provider to seek confidential information from others to meet a legitimate need. However, when such authority is sought:

a. Parents must be informed of their right to refuse to provide such authority. Notice of the right to refuse should appear on the written authorization the parents are asked to sign;

b. The authorization must list those from whom information may be sought and specify the type of information that might be sought from each;

c. Parents must be given the opportunity to limit the information acquired pursuant to the authorization and to limit the parties from whom information may be sought; and the authorization form must provide ample space for parents to write in such limitations;

d. The authorization must be revocable at any time, and the authorization form must inform parents of this fact; and

e. The authorization must be time-limited. The authorization should be effective only until the initial IFSP is developed or, if an IFSP has already been developed, until the next IFSP review. (We anticipate that, when the IFSP team meets to develop or review an IFSP, parents will be asked to review and, if appropriate, renew general authorizations they have previously executed.)

ADMINISTRATIVE PROCEDURES FOR RESOLVING PARENTS' COMPLAINTS

The System for Conducting Formal Hearings

46. The lead agency must ensure the establishment and operation of a system for conducting formal hearings that:

a. entertains parents' complaints about identification; screening; evaluation; assessment; eligibility determinations; the development, review, and implementation of the IFSP; and the failure to respect parents' procedural rights;

b. provides to parents a clear and easy-to-use method of requesting a hearing; and

c. is capable of resolving through a single proceeding a complaint involving two or more public agencies or involving private providers under the jurisdiction of different agencies.

Power to Enforce Decisions

47. Decisions rendered by the system must be enforceable against all public agencies in the Part H system.

Power to Resolve Parents' Complaints about Being Asked to Pay for a Specific Service

48. The system must have the authority to resolve parents' complaints about being asked to pay for a specific early intervention service. The system must therefore be able to render an enforceable decision regarding the following matters:

a. whether the state is obliged to provide a given early intervention service at no cost to the parents, regardless of the parents' financial resources (i.e., even if the parents could afford to pay for the service). Parents may not be required to pay for a service, regardless of their financial resources, if:

1) The service is part of a function that, under the Part H regulations, must be carried out at public expense (e.g., child find; evaluation and as-

sessment; case management; development, review and evaluation of the IFSP; and implementation of procedural safeguards);

2) The service must be provided at no cost pursuant to a state law requiring the provision of a free appropriate public education to children with handicaps from birth; or

3) There is no federal or state law that provides for a system of payments by families for the service, including a schedule of sliding fees.

b. whether the parents are able to pay for the service or provide the service themselves (e.g., transportation). If the parents are unable to pay for or provide the service, the service must be provided free of charge.

49. If the state is required to provide the service at no cost to the parents, the service may not be delayed or denied in the event of a dispute about which public agency or agencies should pay for it.

a. The service must be provided pending the resolution of any such dispute among agencies.

b. The state must have procedures for achieving a timely resolution of disputes among agencies regarding responsibility for paying for a particular service. These procedures must meet the requirements of 34 C.F.R. § 303.523.

Mediation

50. States should develop mediation programs to supplement the formal hearing system.

a. Mediation is an informal process in which an impartial person helps parties in conflict resolve their differences and find a solution satisfactory to all sides. The agreement developed is reduced to writing, and the parties pledge to comply with it. However, they are under no legal compulsion to do so.

b. A formal hearing is a court-like process in which the parties present evidence to a hearing officer, who renders a decision based on the officer's understanding of the facts and the law at issue. Decisions by a hearing officer are in writing and are binding unless appealed through proper channels.

51. Parents should be free to choose mediation, a formal hearing or both to resolve disputes about Part H assessments, evaluations and services.

a. Parents may not be required to participate in mediation as a condition of having a formal hearing.

b. Parents should be free to request mediation services at any time before, during or after a formal hearing.

c. When the parents choose to pursue both mediation and a formal hearing, the formal hearing must be held and a decision rendered within the time limits prescribed by federal law, unless the parents consent to an extension of time.

d. The state may permit agencies and providers to request mediation services to resolve disputes with parents. However, parents must be free to accept or reject participation in such mediation.

The Conduct of Formal Hearings

52. Formal hearings must be conducted as follows:

a. Hearings must occur at times and places reasonably convenient for parents.

b. Parents must have the right to compel the attendance of witnesses and the production of documents.

c. Parents must have the right to prohibit the introduction of evidence that was not disclosed to them at least five days before the proceeding.

d. Parents must have the right to cross-examine opposing witnesses.

e. Parents must have the right to be represented by a lawyer or other advocate.

f. When parents request a hearing, they should be informed of free or low-cost legal or advocacy assistance that may be available to them, and be given a list of organizations that provide or arrange such assistance (e.g., parent training and information centers, protection and advocacy programs and legal aid organizations).

g. Hearing officers must have knowledge of relevant law, of the Part H system and of the needs of and services available for eligible children and their families.

h. Hearing officers must be impartial.

1) They may not be employed by any agency or program involved in the provision of early intervention services or in the care of the child.

2) They may have no other conflict of interest, either personal or professional, that might impair their objectivity (e.g., work for an agency that has a vested interest in the outcome of the questions presented for resolution at the hearing).

3) A person is not considered an "employee" of an agency or provider, as that term is used in (h)(1) above, if the person's responsibilities are limited to conducting hearings and otherwise implementing the complaint resolution processes required by 34 C.F.R. § 303.420.

i. The hearing process must be concluded (i.e., a hearing must be held and a decision rendered) within the time prescribed by law. States should adopt procedures for expediting both hearings and decisions when a child might suffer serious harm if services in dispute are delayed or denied.

j. Hearing officers must render written explanations of their decisions that include findings of facts and conclusions of law.

1) Where the need for a decision is urgent (e.g., if a child might suffer harm from the delay or denial of services in dispute), a decision may be rendered orally at the conclusion of the hearing and a written decision filed later.

2) When the procedure described in (j)(1) above is followed, the parents must be able to rely on the oral decision rendered. In addition, where parents have a right to administratively appeal a hearing decision (as may occur in states that elect to conduct formal hearings under Part B procedures), parents should be given ample time after the written decision is rendered to pursue an administrative appeal.

k. Parents have the right to a written or electronic verbatim transcript of the hearing.

l. Parents who prevail in a formal hearing should be entitled to recover attorney's fees.

Other Requirements Applicable to the Formal Hearing System

53. If parents are required to request a formal hearing in writing, they must be informed of this requirement when notified of their rights.

54. No one other than parents may be permitted to invoke the formal hearing process for resolving complaints.

Publication of Hearing Decisions

55. Decisions rendered in the hearing process, with personal identifying information deleted, should be sent to the Interagency Coordinating Council (ICC).

56. A central file of hearing decisions should be maintained by the lead agency. Copies of these decisions, with all information identifying children and families excised, should be accessible to the public.

Services While a Complaint Is Being Resolved

57. During the pendency of proceedings (including mediation) to resolve a complaint, unless the state and parents agree otherwise, the child and family must continue to receive the early intervention services that were being provided them before the complaint was filed.

58. If the complaint involves an application for initial services, the child and family must receive all services that are not in dispute.

Filing an Action in Court

59. Parents who are aggrieved by the final decision of the formal hearing system (e.g., if the decision denies them a right or service they sought for themselves, their child or their family) may challenge the decision by filing a lawsuit in either federal or state court.

Additional Procedures for Resolving Complaints

60. In addition to ensuring the operation of a system for conducting formal hearings, the lead agency must itself have an administrative system for resolving complaints that a public agency (including the lead agency and the ICC) or a private service provider has violated one or more requirement of the Part H statute or regulations. This system must ensure that:

a. An independent on-site investigation of a complaint is conducted when the lead agency determines that such an investigation is necessary to properly resolve the complaint;

b. The complaint is resolved within 60 days of its receipt, unless the lead agency determines that exceptional circumstances warrant an extension of the 60-day time limit; and

c. Complainants have a right to request that the U.S. Secretary of Education review the final decision of the administrative system.

61. The system must:

a. permit parents, other individuals and organizations to lodge complaints;

b. accept and resolve complaints about conduct affecting an individual child or family as well as complaints pertaining to a systemic failing; and

c. accept and resolve a parent's complaint, regardless of whether the parents are also seeking resolution of the complaint through the formal hearing system.

62. The system should:

a. accept oral as well as written complaints. The lead agency should put oral complaints in writing and then process them exactly as it processes complaints that were originally filed in writing;

b. assist parents and others to lodge complaints by, among other things:

1) offering them technical assistance in framing their complaint; and

2) informing them of individuals and organizations who provide free or low-cost legal or other assistance to persons who wish to lodge a complaint (such as parent training and information centers, protection and advocacy programs and legal aid organizations).

c. develop specific criteria and procedures for:

1) determining when an on-site investigation is needed;

2) interviewing complainants or their representative as part of the fact-finding process;

3) permitting complainants and their representatives to participate in the fact-finding process by submitting relevant evidence, questioning witnesses or other means; and

4) permitting extensions of time under policy #60(b) above.

d. issue a written decision that includes a summary of the evidence considered by the lead agency, findings of fact and conclusions of law, and a determination of the merit of each allegation of unlawful conduct raised in the complaint.

63. Parents must be given information about this system when notified of their rights.

64. Information about findings made and action taken by the administrative system should be made available to both the Interagency Coordinating Council (ICC) and the public. Accordingly, the lead agency should:

a. send to the ICC reports, excluding information identifying children and families, of findings made and actions by the system; and

b. maintain a central file reflecting all findings made and actions taken by the system. A copy of this file, with all identifying information deleted, should be accessible to the public.

APPENDIX C

Legislative History of the Part H Statute

Chronology of Enactment

June 6, 1986
The Senate considered and passed S. 2294.

September 22, 1986
The House struck the text of S. 2294, replacing it with the text of H.R. 5520, and passed S. 2294 as amended.

September 24, 1986
The Senate concurred in the House amendments to S. 2294.

Floor Debate

Congressional Record (Volume 132) June 6, September 22 & 24, 1986.

House Report

No. 99-860 accompanying H.R. 5520 (Committee on Education and Labor), September 22, 1986.

Senate Report

No. 99-315 accompanying S. 2294 (Committee on Labor and Human Resources), June 2, 1986.

APPENDIX D

Part H of the Education of the Handicapped Act

PUBLIC LAW 99-457 [S. 2294]; October 8, 1986

EDUCATION OF THE HANDICAPPED ACT AMENDMENTS OF 1986

For Legislative History of Act see Report for P.L. 99-457 in Legislative History Section, post.

An Act to amend the Education of the Handicapped Act to reauthorize the discretionary programs under that Act, to authorize an early intervention program under that Act for handicapped infants and toddlers and their families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Education of the Handicapped Act Amendments of 1986. Contracts. Grants. 20 USC 1400 note.

SECTION 1. SHORT TITLE; REFERENCE.

(a) SHORT TITLE.—This Act may be cited as the "Education of the Handicapped Act Amendments of 1986".

20 USC 1400.

(b) REFERENCE.—References in this Act to "the Act" are references to the Education of the Handicapped Act.

TITLE I—HANDICAPPED INFANTS AND TODDLERS

SEC. 101. ADDITION OF A NEW PART RELATING TO HANDICAPPED INFANTS AND TODDLERS.

(a) AMENDMENT.—The Act is amended by inserting after the part added by section 316 the following new part:

"PART H—HANDICAPPED INFANTS AND TODDLERS

"FINDINGS AND POLICY

20 USC 1471.

"SEC. 671. (a) FINDINGS.—The Congress finds that there is an urgent and substantial need—

"(1) to enhance the development of handicapped infants and toddlers and to minimize their potential for developmental delay,

"(2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after handicapped infants and toddlers reach school age,

"(3) to minimize the likelihood of institutionalization of handicapped individuals and maximize the potential for their independent living in society, and

"(4) to enhance the capacity of families to meet the special needs of their infants and toddlers with handicaps.

State and local governments.

"(b) POLICY.—It is therefore the policy of the United States to provide financial assistance to States—

"(1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency program of early intervention services for handicapped infants and toddlers and their families,

"(2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage), and

"(3) to enhance its capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to handicapped infants, toddlers, and their families.

"DEFINITIONS

20 USC 1472. "Sec. 672. As used in this part—

"(1) The term 'handicapped infants and toddlers' means individuals from birth to age 2, inclusive, who need early intervention services because they—

"(A) are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: Cognitive development, physical development, language and speech development, psychosocial development, or self-help skills, or

"(B) have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay.

Such term may also include, at a State's discretion, individuals from birth to age 2, inclusive, who are at risk of having substantial developmental delays if early intervention services are not provided.

"(2) 'Early intervention services' are developmental services which—

"(A) are provided under public supervision,

"(B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees,

"(C) are designed to meet a handicapped infant's or toddler's developmental needs in any one or more of the following areas:

"(i) physical development,
"(ii) cognitive development,
"(iii) language and speech development,
"(iv) psycho-social development, or
"(v) self-help skills,

"(D) meet the standards of the State, including the requirements of this part,

"(E) include—

"(i) family training, counseling, and home visits,
"(ii) special instruction,
"(iii) speech pathology and audiology,
"(iv) occupational therapy,
"(v) physical therapy,
"(vi) psychological services,
"(vii) case management services,
"(viii) medical services only for diagnostic or evaluation purposes,
"(ix) early identification, screening, and assessment services, and
"(x) health services necessary to enable the infant or toddler to benefit from the other early intervention services,

"(F) are provided by qualified personnel, including—

"(i) special educators,
"(ii) speech and language pathologists and audiologists,
"(iii) occupational therapists,
"(iv) physical therapists,
"(v) psychologists,

"(vi) social workers,
"(vii) nurses, and
"(viii) nutritionists, and

"(G) are provided in conformity with an individualized family service plan adopted in accordance with section 677.

"(3) The term 'developmental delay' has the meaning given such term by a State under section 676(b)(1).

"(4) The term 'Council' means the State Interagency Coordinating Council established under section 682.

"GENERAL AUTHORITY

State and local governments
Grants.
20 USC 1473

"SEC. 673. The Secretary shall, in accordance with this part, make grants to States (from their allocations under section 684) to assist each State to develop a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide early intervention services for handicapped infants and toddlers and their families.

"GENERAL ELIGIBILITY

State and local governments
Grants.
20 USC 1474

"SEC. 674. In order to be eligible for a grant under section 673 for any fiscal year, a State shall demonstrate to the Secretary (in its application under section 678) that the State has established a State Interagency Coordinating Council which meets the requirements of section 682.

"CONTINUING ELIGIBILITY

State and local governments
Grants.
20 USC 1475

"SEC. 675. (a) FIRST TWO YEARS.—In order to be eligible for a grant under section 673 for the first or second year of a State's participation under this part, a State shall include in its application under section 678 for that year assurances that funds received under section 673 shall be used to assist the State to plan, develop, and implement the statewide system required by section 676.

"(b) THIRD AND FOURTH YEAR.—(1) In order to be eligible for a grant under section 673 for the third or fourth year of a State's participation under this part, a State shall include in its application under section 678 for that year information and assurances demonstrating to the satisfaction of the Secretary that—

"(A) the State has adopted a policy which incorporates all of the components of a statewide system in accordance with section 676 or obtained a waiver from the Secretary under paragraph (2),

"(B) funds shall be used to plan, develop, and implement the statewide system required by section 676, and

"(C) such statewide system will be in effect no later than the beginning of the fourth year of the State's participation under section 673, except that with respect to section 676(b)(4), a State need only conduct multidisciplinary assessments, develop individualized family service plans, and make available case management services.

"(2) Notwithstanding paragraph (1), the Secretary may permit a State to continue to receive assistance under section 673 during such third year even if the State has not adopted the policy required by paragraph (1)(A) before receiving assistance if the State demonstrates in its application—

"(A) that the State has made a good faith effort to adopt such a policy, "(B) the reasons why it was unable to meet the timeline and the steps remaining before such a policy will be adopted, and

"(C) an assurance that the policy will be adopted and go into effect before the fourth year of such assistance.

"(c) FIFTH AND SUCCEEDING YEARS.—In order to be eligible for a grant under section 673 for a fifth and any succeeding year of a State's participation under this part, a State shall include in its application under section 678 for that year information and assurances demonstrating to the satisfaction of the Secretary that the State has in effect the statewide system required by section 676 and a description of services to be provided under section 676(b)(2).

"(d) EXCEPTION.—Notwithstanding subsections (a) and (b), a State which has in effect a State law, enacted before September 1, 1986, that requires the provision of free appropriate public education to handicapped children from birth through age 2, inclusive, shall be eligible for a grant under section 673 for the first through fourth years of a State's participation under this part.

"REQUIREMENTS FOR STATEWIDE SYSTEM

20 USC 1476.

"SEC. 676. (a) IN GENERAL.—A statewide system of coordinated, comprehensive, multidisciplinary, interagency programs providing appropriate early intervention services to all handicapped infants and toddlers and their families shall include the minimum components under subsection (b).

"(b) MINIMUM COMPONENTS.—The statewide system required by subsection (a) shall include, at a minimum—

"(1) a definition of the term 'developmentally delayed' that will be used by the State in carrying out programs under this part,

"(2) timetables for ensuring that appropriate early intervention services will be available to all handicapped infants and toddlers in the State before the beginning of the fifth year of a State's participation under this part,

"(3) a timely, comprehensive, multidisciplinary evaluation of the functioning of each handicapped infant and toddler in the State and the needs of the families to appropriately assist in the development of the handicapped infant or toddler,

"(4) for each handicapped infant and toddler in the State, an individualized family service plan in accordance with section 677, including case management services in accordance with such service plan,

"(5) a comprehensive child find system, consistent with part B, including a system for making referrals to service providers that includes timelines and provides for the participation by primary referral sources,

Public information.

"(6) a public awareness program focusing on early identification of handicapped infants and toddlers,

"(7) a central directory which includes early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State,

"(8) a comprehensive system of personnel development,

"(9) a single line of responsibility in a lead agency designated or established by the Governor for carrying out—

"(A) the general administration, supervision, and monitoring of programs and activities receiving assistance under section 673 to ensure compliance with this part, "(B) the identification and coordination of all available resources within the State from Federal, State, local and private sources,

"(C) the assignment of financial responsibility to the appropriate agency,

"(D) the development of procedures to ensure that services are provided to handicapped infants and toddlers and their families in a timely manner pending the resolution of any disputes among public agencies or service providers,

"(E) the resolution of intra- and interagency disputes, and

"(F) the entry into formal interagency agreements that define the financial responsibility of each agency for paying for early intervention services (consistent with State law) and procedures for resolving disputes and that include all additional components necessary to ensure meaningful cooperation and coordination,

"(10) a policy pertaining to the contracting or making of other arrangements with service providers to provide early intervention services in the State, consistent with the provisions of this part, including the contents of the application used and the conditions of the contract or other arrangements,

"(11) a procedure for securing timely reimbursement of funds used under this part in accordance with section 681(a),

"(12) procedural safeguards with respect to programs under this part as required by section 680, and

"(13) policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including—

"(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing early intervention services, and

"(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State, and

"(14) a system for compiling data on the numbers of handicapped infants and toddlers and their families in the State in need of appropriate early intervention services (which may be based on a sampling of data), the numbers of such infants and toddlers and their families served, the types of services provided (which may be based on a sampling of data), and other information required by the Secretary.

"INDIVIDUALIZED FAMILY SERVICE PLAN

"Sec. 677. (a) Assessment and Program Development.—Each handicapped infant or toddler and the infant or toddler's family shall receive— 20 USC 1477.

"(1) a multidisciplinary assessment of unique needs and the identification of services appropriate to meet such needs, and

"(2) a written individualized family service plan developed by a multidisciplinary team, including the parent or guardian, as required by subsection (d).

"(b) **Periodic Review.**—The individualized family service plan shall be evaluated once a year and the family shall be provided a review of the plan at 6 month-intervals (or more often where appropriate based on infant and toddler and family needs).

"(c) **Promptness After Assessment.**—The individualized family service plan shall be developed within a reasonable time after the assessment required by subsection (a)(1) is completed. With the parent's consent, early intervention services may commence prior to the completion of such assessment.

"(d) **Content of Plan.**—The individualized family service plan shall be in writing and contain—

"(1) a statement of the infant's or toddler's present levels of physical development, cognitive development, language and speech development, psycho-social development, and self-help skills, based on acceptable objective criteria,

"(2) a statement of the family's strengths and needs relating to enhancing the development of the family's handicapped infant or toddler,

"(3) a statement of the major outcomes expected to be achieved for the infant and toddler and the family, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes are being made and whether modifications or revisions of the outcomes or services are necessary,

"(4) a statement of specific early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and the method of delivering services,

"(5) the projected dates for initiation of services and the anticipated duration of such services,

"(6) the name of the case manager from the profession most immediately relevant to the infant's and toddler's or family's needs who will be responsible for the implementation of the plan and coordination with other agencies and persons, and

20 USC 1411.

"(7) the steps to be taken supporting the transition of the handicapped toddler to services provided under part B to the extent such services are considered appropriate.

"STATE APPLICATION AND ASSURANCES

Grants.
Regulations.
20 USC 1478.

"Sec. 678. (a) **Application.**—Any State desiring to receive a grant under section 673 for any year shall submit an application to the Secretary at such time and in such manner as the Secretary may reasonably require by regulation. Such an application shall contain—

"(1) a designation of the lead agency in the State that will be responsible for the administration of funds provided under section 673,

"(2) information demonstrating eligibility of the State under section 674.

"(3) the information or assurances required to demonstrate eligibility of the State for the particular year of participation under section 675, and

"(4)(A) information demonstrating that the State has provided (i) public hearings, (ii) adequate notice of such hearings, and (iii) an opportunity for comment to the general public before the submission of such application and before the adoption by the

State of the policies described in such application, and (B) a summary of the public comments and the State's responses,

"(5) a description of the uses for which funds will be expended in accordance with this part and for the fifth and succeeding fiscal years a description of the services to be provided,

"(6) a description of the procedure used to ensure an equitable distribution of resources made available under this part among all geographic areas within the State, and

"(7) such other information and assurances as the Secretary may reasonably require by regulation.

Regulations.

"(b) STATEMENT OF ASSURANCES.—Any State desiring to receive a grant under section 673 shall file with the Secretary a statement at such time and in such manner as the Secretary may reasonably require by regulation. Such statement shall—

"(1) assure that funds paid to the State under section 673 will be expended in accordance with this part,

"(2) contain assurances that the State will comply with the requirements of section 681,

"(3) provide satisfactory assurance that the control of funds provided under section 673, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part and that a public agency will administer such funds and property,

"(4) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this part, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part,

"(5) provide satisfactory assurance that Federal funds made available under section 673 (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for handicapped infants and toddlers and their families and in no case to supplant such State and local funds,

"(6) provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under section 673 to the State, and

"(7) such other information and assurances as the Secretary may reasonably require by regulation.

"(c) APPROVAL OF APPLICATION AND ASSURANCES REQUIRED.—No State may receive a grant under section 673 unless the Secretary has approved the application and statement of assurances of that State. The Secretary shall not disapprove such an application or statement of assurances unless the Secretary determines, after notice and opportunity for a hearing, that the application or statement of assurances fails to comply with the requirements of this section.

"USES OF FUNDS

"SEC. 679. In addition to using funds provided under section 673 to plan, develop, and implement the statewide system required by section 676, a State may use such funds—

State and local governments.
20 USC 1479.

"(1) for direct services for handicapped infants and toddlers that are not otherwise provided from other public or private sources, and

"(2) to expand and improve on services for handicapped infants and toddlers that are otherwise available.

"PROCEDURAL SAFEGUARDS

State and local governments.
20 USC 1480.

"Sec. 680. The procedural safeguards required to be included in a statewide system under section 676(b)(12) shall provide, at a minimum, the following:

"(1) The timely administrative resolution of complaints by parents. Any party aggrieved by the findings and decision regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Confidentiality.

"(2) The right to confidentiality of personally identifiable information.

"(3) The opportunity for parents and a guardian to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the individualized family service plan.

"(4) Procedures to protect the rights of the handicapped infant and toddlers whenever the parents or guardian of the child are not known or unavailable or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State agency providing services) to act as a surrogate for the parents or guardian.

"(5) Written prior notice to the parents or guardian of the handicapped infant or toddler whenever the State agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, placement, or the provision of appropriate early intervention services to the handicapped infant or toddler.

"(6) Procedures designed to assure that the notice required by paragraph (5) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section.

"(7) During the pendency of any proceeding or action involving a complaint, unless the State agency and the parents or guardian otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided or if applying for initial services shall receive the services not in dispute.

"PAYOR OF LAST RESORT

20 USC 1481.

"Sec. 681. (a) Nonsubstitution.—Funds provided under section 673 may not be used to satisfy a financial commitment for services which would have been paid for from another public or private source but for the enactment of this part, except that whenever considered necessary to prevent the delay in the receipt of appropriate early intervention services by the infant or toddler or family in a timely fashion, funds provided under section 673 may be used to pay the provider of services pending reimbursement from the agency which has ultimate responsibility for the payment.

"(b) Reduction of Other Benefits.—Nothing in this part shall be construed to permit the State to reduce medical or other assistance available or to alter eligibility under title V of the Social Security Act (relating to maternal and child health) or title XIX of the Social Security Act (relating to medicaid for handicapped infants and toddlers) within the State. 42 USC 701. 42 USC 1396.

"STATE INTERAGENCY COORDINATING COUNCIL

"Sec. 682. (a) Establishment.—(1) Any State which desires to receive financial assistance under section 673 shall establish a State Interagency Coordinating Council composed of 15 members. 20 USC 1482.

"(2) The Council and the chairperson of the Council shall be appointed by the Governor. In making appointments to the Council, the Governor shall ensure that the membership of the Council reasonably represents the population of the State.

"(b) Composition.—The Council shall be composed of—

"(1) at least 3 parents of handicapped infants or toddlers or handicapped children aged 3 through 6, inclusive,

"(2) at least 3 public or private providers of early intervention services,

"(3) at least one representative from the State legislature,

"(4) at least one person involved in personnel preparation, and

"(5) other members representing each of the appropriate agencies involved in the provision of or payment for early intervention services to handicapped infants and toddlers and their families and others selected by the Governor.

"(c) Meetings.—The Council shall meet at least quarterly and in such places as it deems necessary. The meetings shall be publicly announced, and, to the extent appropriate, open and accessible to the general public.

"(d) Management Authority.—Subject to the approval of the Governor, the Council may prepare and approve a budget using funds under this part to hire staff, and obtain the services of such professional, technical, and clerical personnel as may be necessary to carry out its functions under this part.

"(e) Functions of Council.—The Council shall—

"(1) advise and assist the lead agency designated or established under section 676(b)(9) in the performance of the responsibilities set out in such section, particularly the identification of the sources of fiscal and other support for services for early intervention programs, assignment of financial responsibility to the appropriate agency, and the promotion of the interagency agreements,

"(2) advise and assist the lead agency in the preparation of applications and amendments thereto, and

"(3) prepare and submit an annual report to the Governor and to the Secretary on the status of early intervention programs for handicapped infants and toddlers and their families operated within the State. Report "(f) Conflict of Interest.—No member of the Council shall cast a vote on any matter which would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

"(g) Use of Existing Councils.—To the extent that a State has established a Council before September 1, 1986, that is comparable to the Council described in this section, such Council shall be considered to be in compliance with this section. Within 4 years after the date the State accepts funds under section 673, such State shall establish a council that complies in full with this section.

"FEDERAL ADMINISTRATION

State and local governments.
Education.
20 USC 1483.
20 USC 1416, 1417, 1420.

"Sec. 683. Sections 616, 617, and 620 shall, to the extent not inconsistent with this part, apply to the program authorized by this part, except that—

"(1) any reference to a State educational agency shall be deemed to be a reference to the State agency established or designated under section 676(b)(9),

"(2) any reference to the education of handicapped children and the education of all handicapped children and the provision of free public education to all handicapped children shall be deemed to be a reference to the provision of services to handicapped infants and toddlers in accordance with this part, and

"(3) any reference to local educational agencies and intermediate educational agencies shall be deemed to be a reference to local service providers under this part.

"ALLOCATION OF FUNDS

Guam.
American Samoa.
Virgin Islands.
Republic of the Marshall Islands.
Federated States of Micronesia.
Republic of Palau.
Commonwealth of the Northern Mariana Islands.
20 USC 1484.

"Sec. 684. (a) From the sums appropriated to carry out this part for any fiscal year, the Secretary may reserve 1 percent for payments to Guam, American Samoa, the Virgin Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, the Republic of Palau, and the Commonwealth of the Northern Mariana Islands in accordance with their respective needs.

"(b)(1) The Secretary shall make payments to the Secretary of the Interior according to the need for such assistance for the provision of early intervention services to handicapped infants and toddlers and their families on reservations serviced by the elementary and secondary schools operated for Indians by the Department of the Interior. The amount of such payment for any fiscal year shall be 1.25 percent of the aggregate of the amount available to all States under this part for that fiscal year.

"(2) The Secretary of the Interior may receive an allotment under paragraph (1) only after submitting to the Secretary an application which meets the requirements of section 678 and which is approved by the Secretary. Section 616 shall apply to any such application.

20 USC 1416.

"(c)(1) For each of the fiscal years 1987 through 1991 from the funds remaining after the reservation and payments under subsections (a) and (b), the Secretary shall allot to each State an amount which bears the same ratio to the amount of such remainder as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States, except that no State shall receive less than 0.5 percent of such remainder.

"(2) For the purpose of paragraph (1)—

"(A) the terms 'infants' and 'toddlers' mean children from birth to age 2, inclusive, and

"(B) the term 'State' does not include the jurisdictions described in subsection (a).

"(d) If any State elects not to receive its allotment under subsection (c)(1), the Secretary shall reallot, among the remaining States, amounts from such State in accordance with such subsection.

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 685. There are authorized to be appropriated to carry out this part $50,000,000 for fiscal year 1987, $75,000,000 for fiscal year 1988, and such sums as may be necessary for each of the 3 succeeding fiscal years.". 20 USC 1485.

(b) STUDY OF SERVICES; COORDINATION OF ACTIONS.—(1) The Secretary of Education and the Secretary of Health and Human Services shall conduct a joint study of Federal funding sources and services for early intervention programs currently available and shall jointly act to facilitate interagency coordination of Federal resources for such programs and to ensure that funding available to handicapped infants, toddlers, children, and youth from Federal programs, other than programs under the Education of the Handicapped Act, is not being withdrawn or reduced. 20 USC 1485 note.

(2) Not later than 18 months after the date of the enactment of this Act, the Secretary of Education and the Secretary of Health and Human Services shall submit a joint report to the Congress describing the findings of the study conducted under paragraph (1) and describing the joint action taken under that paragraph. 20 USC 1400. Report.

APPENDIX E : Federal Regulations Implementing Part H

26306 **Federal Register** / Vol. 54, No. 119 / Thursday, June 22, 1989 / Rules and Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 303

RIN 1820–AA49

Early Intervention Program for Infants and Toddlers With Handicaps

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations for the program for infants and toddlers with handicaps that was established under the 1986 amendments to the Education of the Handicapped Act (EHA). These regulations are intended to assist States in applying for funds under this authority, and to ensure that an effective early intervention program is established in each participating State.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments, with the exception of the following sections: § 303.113(b); §§ 303.141 through 303.146; §§ 303.148 through 303.150; § 303.151(b)(4); § 303.152; §§ 303.160 through 303.175; $303.301; § 303.341; § 303.344; § 303.403; § 303.420; § 303.510; § 303.520; § 303.540; and § 303.653. These provisions of the regulations will become effective after the information collection requirements contained in the provisions have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Thomas B. Irvin, Office of Special Education Programs, Department of Education, 400 Maryland Avenue SW. (Switzer Building, Room 4618 M/S 2313–4600), Washington, DC 20202. Telephone: (202) 732–1114.

SUPPLEMENTARY INFORMATION:

A. Background

The Education of the Handicapped Act Amendments of 1986 (Pub. L. 99–457) added a new formula grant program to assist States in establishing a statewide, comprehensive system of early intervention services for infants and toddlers with handicaps and their families. This new program (designated as Part H of the EHA) provides a phase-in period for States to develop the statewide system, including (1) adopting a policy that incorporates all of the components of the statewide system, as part of a State's third year application; (2) having the system in effect no later than the beginning of the fourth year of participation; and (3) providing appropriate early intervention services to all eligible children and their families no later than the beginning of the fifth year.

The following is a list of the components of the statewide system and the sections or subparts in which the components are included in these regulations:

(1) State definition of developmental delay (§§ 303.160 and 303.300);

(2) Central directory of information (§§ 303.161 and 303.301);

(3) Timetables for serving all eligible children (§§ 303.162 and 303.302);

(4) Public awareness program (§§ 303.163 and 303.320);

(5) Comprehensive child find system (§§ 303.164 and 303.321);

(6) Evaluation and assessment (§§ 303.165 and 303.322);

(7) Individualized family service plans (§§ 303.166 and 303.340 through 303.346);

(8) Comprehensive system of personnel development (§§ 303.167 and 303.360);

(9) Personnel standards (§§ 303.168 and 303.361);

(10) Procedural safeguards (§ 303.169 and Subpart E);

(11) Lead agency designation and responsibilities (§§ 303.142, 303.170 through 303.174, and Subpart F);

(12) Policy for contracting or otherwise arranging for services (§§ 303.174 and 303.526);

(13) Procedure for timely reimbursement of funds (§§ 303.172, 303.527(b), 303.528); and

(14) Data collection (§§ 303.175 and 303.540).

Part H is the only grant program within the Federal government that focuses exclusively on the provision of services to children with handicaps from birth through age two. However, in enacting Part H, the Congress made clear that the success of the program is dependent upon interagency coordination—both in providing and paying for appropriate early intervention services. The statute includes a number of requirements that are directed toward ensuring a coordinated approach to the provision and financing of services, including (1) interagency agreements that define the financial responsibility of each agency, (2) a State Interagency Coordinating Council to assist the lead agency in identifying and coordinating financial resources, and (3) nonsubstitution of funds and non-reduction of benefits.

Regarding the need for shared financial responsibility, the Report of the House of Representatives on Pub. L. 99–457 states:

> Thus, it is our intent that other funding sources continue; that there is greater coordination among agencies regarding the payment of costs; and that funds under Part H be used only for direct services for handicapped infants and toddlers that are not otherwise provided from other public or private sources * * * (House Rpt. No. 99–860, 15 (1986).)

Part H is designed to build upon existing State systems of early intervention services, and to facilitate development of systems in those States desiring to serve young children with handicaps from birth through age two. The program enables States to use funds under this part to develop a statewide system that fits their own characteristics.

During the initial years of participation under Part H, it is expected that, to the extent appropriate, States will continue, or capitalize on, the planning, development, and implementation efforts that were started under the EHA amendments of 1983 (Pub. L. 98–199). Under those amendments, a State grant provision was added to the Handicapped Children's Early Education Program (section 623(b) of the EHA) to assist States in establishing a comprehensive delivery system for providing special education and related services to children with handicaps from birth through age five. The 1983 amendments also added a provision that permitted States to use funds under the preschool incentive grant program (section 619 of the EHA) to serve children from birth through two, as well as three through five.

With the enactment of Pub. L. 99–457, (1) the State grant provision under section 623(b) was eliminated, and Part H was added, and (2) section 619 was amended to only permit direct services for children three through five. However, under the new section 619 (Preschool Grants program), States may still use a portion of their annual grant funds (up to 20%) for planning and developing a comprehensive delivery system of services for children from birth through five.

Part H substantially expands the State grant provisions that were initiated under Pub. L. 98–199, but limits the age range of children to be served by the program to children from birth through two. Thus, activities under Part H must be directed to infants and toddlers with handicaps—including activities to prepare for the transition of these children as they reach age three to preschool services under Part B of the EHA or other appropriate services (see § 303.344(h)).

B. Analysis of Comments and Changes

In the November 18, 1987, NPRM, the Secretary allowed 60 days for interested parties to comment on the proposed regulations. At public request, that period was extended for an additional 30 days.

Over 2,500 written comments were received on the NPRM from a variety of agencies, individuals, and organizations. An analysis of the comments and of the changes that have been made in the regulations since publication of the NPRM is included in Appendix A to these final regulations.

A technical change has been made to § 303.4, due to the publication in the **Federal Register** (53 FR 8033 through 8103, March 11, 1988) of the new 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments). Part 80 is a part of the Education Department General Administrative Regulations (EDGAR). Effective October 1, 1988, Part 80 and not Part 74 applies with respect to grants and cooperative agreements to State and local governments.

An additional technical change has been made to § 303.4 to reference the new 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Work Place (Grants)) published May 26, 1988 (53 FR 19190 through 19193, 19204 through 19211). Part 85 is also a part of EDGAR and became effective October 1, 1988.

Another technical change has been made to § 303.4 to eliminate the references to Part 78 (Education Appeal Board). Section 3501 of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 amended Part E of the General Education Provisions Act (GEPA) to provide for new enforcement procedures that became effective October 25, 1988. The amended Part E requires the Secretary to establish an Office of Administrative Law Judges (OALJ) to replace the existing Education Appeal Board, and sets out new hearing procedures. 20 U.S.C. 1234 through 1234i.

On May 5, 1989, the Department published final regulations (54 FR 19512 through 19522) adding a new Part 81 to Title 34 of the Code of Federal Regulations and establishing general procedural rules for proceedings before the OALJ and specific rules for OALJ hearings for recovery of funds. A reference to the new Part 81 has been added to these regulations.

The drafters of the NPRM for this part contemplated that the State complaint procedures contained in the Education Department General Administrative Regulations (EDGAR) at 34 CFR 76.780 through 76.782 would be applicable to this program. (The NPRM at § 303.4(a)(1) made 34 CFR Part 76 applicable to the Part H program.) A number of commenters, however, requested that the final regulations specifically include State procedures for resolving complaints under the Part H program.

In addition, subsequent to the publication of the NPRM for this program, the Department published an NPRM proposing changes to EDGAR. *See* 53 FR 31580 through 31606 (August 18, 1988). One of those proposed changes was the removal of the State complaint procedures in 34 CFR 76.780 through 76.782 of EDGAR and the transfer of those procedures, with some modification, to the regulations implementing Part B of the Education of the Handicapped Act, which had shown the greatest need for the complaint procedures. In response to comments on the EDGAR NPRM, the Secretary is reconsidering whether to remove the complaint procedures from EDGAR. Since no final action has yet been taken on the changes proposed to EDGAR, and in light of the Secretary's determination that the EDGAR procedures needed some minor adjustments to accommodate distinctive features of the Part H program, the Secretary has included the State complaint procedures from EDGAR, with appropriate minor modifications, in these Part H regulations.

C. Major Changes in the Regulations

1. General and Organizational Changes

A number of changes have been made in the regulations as a result of the comments received. For example, additional guidance has been added in the text of the regulations and in the explanatory notes throughout the document to address the large number of requests for that guidance. Other changes have been made to clarify and unify treatment of common issues.

The term "infants and toddlers with handicaps," as used throughout the NPRM, has generally been replaced in these final regulations with the term "children eligible under this part."

Some major organizational changes have also been made, as indicated below:

- The five subparts in the NPRM have been reorganized into seven subparts, as follows: The requirements on procedural safeguards and State administration have been moved from Subpart D and made into separate subparts (i.e., "Procedural Safeguards" and "State Administration"). Subpart D has been retitled "Program and Service Components of a Statewide System of Early Intervention Services."
- The section numbers have been changed, so that each subpart begins with the next one hundred number (e.g., Subpart A begins with § 303.1, Subpart B with § 303.100, and Subpart C with § 303.200).

2. Redesignation Table

To assist readers in finding where each section from the NPRM is located in the final regulations, a redesignation table has been included in Appendix B to these final regulations.

3. Changes in Subpart A (General)

Some of the changes that have been made in Subpart A are:

- The term "case management" has been added to the regulations. The term "case management services" has been retained, and a distinction has been made between the two terms. "Case management" is a coordinative function that includes activities that are designed to assist and enable an eligible child and the child's family to obtain appropriate early intervention services (see § 303.6). On the other hand, "case management services" are included under the definition of early intervention services (see § 303.12(c)(2)).
- A definition of "early intervention program" (§ 303.11) has been added to clarify that services and funding from other agencies and programs are important in meeting the needs of eligible children and their families.
- The reference to the related services definitions in Part B of the EHA (§ 303.16) has been dropped. New definitions for each of the early intervention services in Part H, which conform to professionally accepted definitions, have been added at § 303.12.
- Several new definitions have been added to the regulations, including "days" (§ 303.9), "include-including" (§ 303.15), "multidisciplinary" (§ 303.17), "parent" (§ 303.18), "policies" (§ 303.19), "public agency" (§ 303.20), "qualified" (§ 303.21), "State" (§ 303.22), and "transportation" (§ 303.23).
- Clarifying notes have been added to the definitions of "early intervention services," "health services," and "infants and toddlers with handicaps."

4. Changes in Subpart B (State Application for a Grant)

Some of the changes that have been made in Subpart B are:

- A subheading has been added on "Public participation." All substantive requirements concerning public participation have been consolidated under that subheading (see §§ 303.110 through 303.113).
- The section on fourth year applications (§ 303.150) has been revised to include a requirement that information on each component of the statewide system must be included in the application for that year.
- A new subheading has been added to specify what information must be in a State's fourth year application for each component in the statewide system (see §§ 303.160 through 303.175).
- The section on fifth year applications (§ 303.152) has been revised to require that a State's application for that year must include (a) a policy that, no later than the beginning of the fifth year of the State's participation, appropriate early intervention services will be available to all eligible children in the State and their families, and (b) a description of the services to be provided no later than the beginning of the fifth year.
- A provision regarding payments to the Secretary of the Interior, that was in Subpart C (§ 303.52(a)) of the NPRM, has been moved to Subpart B under the section entitled, "Eligibility of the Secretary of the Interior for assistance."

5. Changes in Subpart C

The following changes have been made in Subpart C (Procedures for Making Grants to States):

- The section on "Distribution of allotments for non-participating States" (§ 303.201) has been changed to clarify that all funds will be allotted.
- The statutory definition of "infants and toddlers" that is used for the purpose of alloting funds has been added. The definition has been modified to clarify that the term means "children from birth through age two in the general population, based on the most recent satisfactory data as determined by the Secretary."

6. Changes in Subpart D

In response to public comments on Subpart D (Program and Service Components of a Statewide System of Early Intervention Services), additional guidance has been added to most of the sections in that subpart, including the provisions on the central directory, public awareness program, comprehensive child find system, evaluation and assessment, and individualized family service plans (IFSPs). Some of the changes that have been made are:

- A timeline of 45 days has been established for an agency, upon receiving a referral, to (a) complete the evaluation and assessment process and (b) hold an IFSP meeting (see §§ 303.321 and 303.322).
- The decision-making role of the family in the family assessment has been strengthened (see § 303.322).
- A new section has been added on "Nondiscriminatory procedures" (§ 303.323).
- The provisions on individualized family service plans have been reorganized and greatly expanded, including adding (a) a definition of IFSP (§ 303.340(b)), (b) requirements about IFSP meetings and participants at those meetings (§§ 303.342 and 303.343), and (c) conditions regarding the provision of services before assessment is completed (§ 303.345).
- The section on "Content of IFSPs" has been expanded to (a) distinguish between early intervention services and other services that a child may need, but that are not required under this part, and (b) provide other guidance and clarifying information.
- A note has been added following § 303.344 to stress the need for lead agencies to adopt a process for ensuring the effective transition of children from the program under Part H to preschool services under Part B of the Act.
- The requirements regarding "personnel standards" (§ 303.360) have been changed to reflect the comments received on the regulations for both this part and Part B of the Act.

7. Subpart E (Procedural Safeguards)

The procedural safeguards provisions in the NPRM have been reorganized and new provisions have been added to address the comments received. Some of the changes that have been made are:

- The requirements on native language that are in the Part B regulations (34 CFR Part 300) have been incorporated into the regulations for this part and expanded (§ 303.403(b)). The following other provisions from the Part B regulations have been added to this part with adaptations: Parental consent (§ 303.404), surrogate parents (§ 303.405), and parental rights in administrative hearings (§ 303.422).
- The confidentiality of information requirements under Part B (34 CFR 300.560 through 300.576) have been adopted (and referenced) as the procedures for States to follow under Part H (see § 303.460). A note has been added following that section to clarify that the regulations in 34 CFR Part 99 (Privacy Rights of Parents and Students), which are incorporated by reference in the Part B confidentiality regulations, also apply to Part H.
- The provision in the NPRM that gave States the option of adopting the procedural safeguards under Part B, adopting selected parts of the Part B safeguards and developing new procedures for the remaining safeguards required by Part H, or establishing new safeguards has been changed to limit the options to (a) adopting the due process procedures in Part B (34 CFR 300.506 through 300.513), or (b) developing new impartial procedures for resolving individual child complaints under this part.

8. Subpart F (State Administration)

The provisions on State administration have been reorganized and expanded. They now include:

- Requirements adapted from EDGAR regarding lead agency procedures for resolving complaints (including systemic complaints).
- Clarifying provisions related to financial matters, including sections on fees (§ 303.521), identification and coordination of resources (§ 303.522), interagency agreements (§ 303.523), and payor of last resort (§ 303.527).
- A new § 303.560 has been added to clarify that lead agencies may use funds under this part for administering the State's early intervention program.

9. Subpart G (State Interagency Coordinating Council)

The subpart on the Council has been reorganized and expanded to address the comments received. The following are some of the changes that have been made:

- Clarifying notes have been added to the sections on establishment and composition of the Council (§§ 303.601 and 303.602).
- The provisions related to the conduct of Council meetings (§ 303.603) have been expanded.
- The functions of the Council have been expanded to clarify that the Council plays an important role in ensuring the effective implementation of this part within each State, especially in identifying and developing policies and procedures for coordinating payments for services, and promoting interagency agreements (§§ 303.650 through 303.653)

D. Use of Notes in the Regulations

In the text of these final regulations, a series of notes has been included following selected sections. These notes provide explanatory material or suggestions for meeting specific legal requirements. Where a note sets forth a permissible course of action, a State may either rely upon the note or take any other course of action that meets the applicable requirements.

Executive Order 12606

Part H recognizes the unique and critical role that families play in the development of infants and toddlers who are eligible under this Part. It is clear, both from the statute and the legislative history of the Act, that the Congress intended for families to play an active, collaborative role in the planning and provision of early intervention services. Thus, these regulations, which are consistent with the requirements of Executive Order 12606—The Family—should have a positive impact on the family, because they strengthen the authority and encourage the increased participation of parents in meeting the early intervention needs of their children.

Executive Order 12612

These final regulations have been developed (1) to be responsive to the overarching request by hundreds of commenters that more guidance be provided in all major areas under this part, and (2) to be consistent with the principles of Executive Order 12612—Federalism. Every effort has been made to ensure that, to the extent possible, each State has the authority and flexibility to implement the provisions of this part in accordance with that State's own unique situation; and that decisions related to the planning, development, and implementation of the statewide system of early intervention services remain with the State.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster intergovernmental partnership and a strengthened Federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by any other agency or authority of the United States.

Based on the response to the NPRM and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 303

Education, Education of the handicapped, Grant program education, medical personnel, State educational agencies.

Dated: May 12, 1989.

(Catalogue of Federal Domestic Assistance Number 84.181; Early Intervention Programs for Infants and Toddlers with Handicaps)

Lauro F. Cavazos,

Secretary of Education.

The Secretary amends Title 34 of the Code of Federal Regulations by adding a new Part 303 to read as follows:

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH HANDICAPS

Subpart A—General

Purpose, Eligibility, and Other General Provisions

Sec.
303.1 Purpose of the early intervention program for infants and toddlers with handicaps.
303.2 Eligible applicants for an award.
303.3 Activities that may be supported under this part.
303.4 Applicable regulations.

Definitions

303.5 Act.
303.6 Case management.
303.7 Children.
303.8 Council.
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303.10 Developmental delay.
303.11 Early intervention program.
303.12 Early intervention services.
303.13 Health services.
303.14 IFSP.
303.15 Include; including.
303.16 Infants and toddlers with handicaps.
303.17 Multidisciplinary.
303.18 Parent.
303.19 Policies.
303.20 Public agency.
303.21 Qualified.
303.22 State.
303.23 Transportation.
303.24 EDGAR definitions that apply.

Subpart B—State Application for a Grant

General Requirements

303.100 Conditions of assistance.
303.101 How the Secretary disapproves a State's application or statement of assurances.

Public Participation

303.110 General requirements and timelines for public participation.
303.111 Notice of public hearings and opportunity to comment.
303.112 Pulblic hearings.
303.113 Reviewing and reporting on public comments received.

Statement of Assurances

303.120 General.
303.121 Reports and records.
303.122 Control of funds and property.
303.123 Prohibition against commingling.
303.124 Prohibition against supplanting.
303.125 Fiscal control.
303.126 Payor of last resort.
303.127 Assurance regarding expenditure of funds.

General Requirements for a State Application

303.140 General.
303.141 Information about the Council.
303.142 Designation of lead agency.
303.143 Assurance regarding use of funds.
303.144 Description of use of funds.
303.145 Information about public participation.
303.146 Equitable distribution of resources.

Specific Application Requirements for Years One Through Five and Thereafter

303.147 Application requirements for the first and second years.
303.148 Third year applications.
303.149 Waiver of the policy adoption requirement for the third year.
303.150 Fourth year applications.
303.151 States with mandates as of September 1, 1986 to serve children with handicaps from birth.
303.152 Applications for year five and each year thereafter.

Application Requirements for Years Four, Five, and Thereafter Related to Components of a Statewide System

303.160 State definition of developmental delay.
303.161 Central directory.
303.162 Timetables for serving all eligible children.
303.163 Public awareness program.
303.164 Comprehensive child find system.
303.165 Evaluation, assessment, and nondiscriminatory procedures.
303.166 Individualized family service plans.
303.167 Comprehensive system of personnel development (SCPD).
303.168 Personnel standards.
303.169 Procedural safeguards.
303.170 Supervision and monitoring of programs.
303.171 Lead agency procedures for resolving complaints.
303.172 Policies and procedures related to financial matters.

Insert between pages 154 and 155, Appendix E, in *Strengthening the Role of Families in States' Early Intervention Systems.*

303.173 Interagency agreements: resolution of individual disputes.
303.174 Policy for contracting or otherwise arranging for services.
303.175 Data collection.

Participation by the Secretary of the Interior

303.180 Eligibility of the Secretary of the Interior for assistance.

Subpart C—Procedures for Making Grants to States

303.200 Formula for State allocations.
303.201 Distribution of allotments from non-participating States.
303.202 Minimum grant that a State may receive.
303.203 Payments to the Secretary of the Interior.
303.204 Payments to the jurisdictions.

Subpart D—Program and Service Components of a Statewide System of Early Intervention Services

General

303.300 State definition of developmental delay.
303.301 Central directory.
303.302 Timetables for serving all eligible children.

Identification and Evaluation

303.320 Public awareness program.
303.321 Comprehensive child find system.
303.322 Evaluation and assessment.
303.323 Nondiscriminatory procedures.

Individualized Family Service Plans (IFSPs)

303.340 General.
303.341 Meeting the IFSP requirements for years four and five.
303.342 Procedures for IFSP development, review, and evaluation.
303.343 Participants in IFSP meetings and periodic reviews.
303.344 Content of IFSP.
303.345 Provision of services before evaluation and assessment are completed.
303.346 Responsibility and accountability.

Personnel Training and Standards

303.360 Comprehensive system of personnel development.
303.361 Personnel standards.

Subpart E—Procedural Safeguards

General

303.400 General responsibility of lead agency for procedural safeguards.
303.401 Definitions of consent, native language, and personally identifiable information.
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303.403 Prior notice; native language.
303.404 Parent consent.
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303.420 Administrative resolution of individual child complaints by an impartial decision-maker.
303.421 Appointment of an impartial person.
303.422 Parent rights in administrative proceedings.
303.423 Convenience of proceedings; timelines.
303.424 Civil action.
303.425 Status of child during proceedings.

Confidentiality

303.460 Confidentiality of information.

Subpart F—State Administration

General

303.500 Lead agency establishment or designation.
303.501 Supervision and monitoring of programs.

Lead Agency Procedures for Resolving Complaints

303.510 Adopting complaint procedures.
303.511 An organization or individual may file a complaint.
303.512 Minimum complaint procedures.

Policies and Procedures Related to Financial Matters

303.520 Policies related to payment for services.
303.521 Fees.
303.522 Identification and coordination of resources.
303.523 Interagency agreements.
303.524 Resolution of disputes.
303.525 Delivery of services in a timely manner.
303.526 Policy for contracting or otherwise arranging for services.
303.527 Payor of last resort.
303.528 Reimbursement procedure.

Reporting Requirements

303.540 Data collection.

Use of Funds for State Administration

303.560 Use of funds by the lead agency.

Subpart G—State Interagency Coordinating Council

General

303.600 Establishment of Council.
303.601 Composition.
303.602 Use of funds by the Council.
303.603 Meetings.
303.604 Conflict of interest.

Functions of the Council

303.650 General.
303.651 Advising and assisting the lead agency in its administrative duties.
303.652 Applications.
303.653 Annual report to the Secretary.

Existing Councils

303.670 Use of existing councils

Authority: 20 U.S.C. 1471–1485, unless otherwise noted.

Subpart A—General

Purpose, Eligibility, and Other General Provisions

§ 303.1 Purpose of the early intervention program for infants and toddlers with handicaps.

The purpose of this part is to provide financial assistance to States to—

(a) Develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency program of early intervention services for infants and toddlers with handicaps and their families;

(b) Facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage); and

(c) Enhance the States' capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with handicaps and their families.

(Authority: 20 U.S.C. 1471)

§ 303.2 Eligible applicants for an award.

Eligible applicants include the 50 States, Puerto Rico, the District of Columbia, the Secretary of the Interior, and the following jurisdictions: Guam, American Samoa, the Virgin Islands, the Republic of Palau, and the Commonwealth of the Northern Mariana Islands. The future eligibility of the Republic of Palau will be governed by the terms of the Compact of Free Association.

(Authority: 20 U.S.C. 1484)

§ 303.3 Activities that may be supported under this part.

Funds under this part may be used for the following activities:

(a) To plan, develop, and implement a statewide system of early intervention services for children eligible under this part and their families.

(b) For direct services for eligible children and their families that are not otherwise provided from other public or private sources.

(c) To expand and improve on services for eligible children and their families that are otherwise available, consistent with § 303.527.

(Authority: 20 U.S.C. 1473, 1479)

§ 303.4 Applicable regulations.

(a) The following regulations apply to this part:

(1) The Education Department General Administrative Regulations (EDGAR), including—

(i) Part 76 (State Administered Programs), except for § 76.103;

(ii) Part 77 (Definitions that Apply to Departmental Programs);

(iii) Part 79 (Intergovernmental Review of Department of Education Programs and Activities);

(iv) Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments);

(v) Part 81 (Grants and Cooperative Agreements under the General Education Provisions Act); and

(vi) Part 85 (Governmentwide Debarment and Suspension (Non—procurement) and Governmentwide Requirements for Drug-Free Work Place (Grants)).

(2) The regulations in this Part 303.

(3) The following regulations in 34 CFR Part 300 (Assistance to States for Education of Handicapped Children): §§ 300.560 through 300.576, and §§ 300.581 through 300.586.

(b) In applying the regulations cited in paragraphs (a)(1) and (a)(3) of this section, any reference to—

(1) "State educational agency" means the lead agency under this part; and

(2) "Special education," "related services," "free public education," or "education" means "early intervention services" under this part.

(Authority: 20 U.S.C. 1401–1418; 1420; 1483)

Definitions

Note: Sections 303.5–303.23 include definitions that are used throughout these regulations. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections in which they are defined:

Aggregate amount (§ 303.200(b)(1))

Appropriate professional requirements in the State (§ 303.361(a)(1))

Assessment (§ 303.322(b)(2))

Consent (§ 303.401(a))

Evaluation (§ 303.322(b)(1))

Frequency and intensity (§ 303.344(d)(2)(i))

From the profession most immediately relevant to the child's or family's needs (§ 303.344(g)(3))

Highest requirements in the State applicable to a profession or discipline (§ 303.361)(a)(2))

Individualized family service plan and IFSP (§ 303.340(b))

Impartial (§ 303.421(b))

Location (§ 303.344(d)(2)(ii))

Method (§ 303.344(d)(iii))

Native language (§ 303.401(b))

Personally identifiable (§ 303.401(c))

Primary referral sources (§ 303.321(d)(3))

Profession or discipline (§ 303.361(a)(3))

Special definition of "infants and toddlers" (§ 303.200(b)(2))

Special definition of "State" (§ 303.200(b)(3))

State approved or recognized certification, licensing, registration, or other comparable requirements (§ 303.361(a)(4))

Statement of assurances (§ 303.120)

§ 303.5 Act.

As used in this part, "Act" means the Education of the Handicapped Act.

(Authority: 20 U.S.C. 1401 *et seq.*)

§ 303.6 Case management.

(a) *General.* (1) As used in this part, "case management" means the activities carried out by a case manager to assist and enable a child eligible under this part and the child's family to receive the rights, procedural safeguards, and services that are authorized to be provided under the State's early intervention program.

(2) Each child eligible under this part and the child's family must be provided with one case manager who is responsible for—

(i) Coordinating all services across agency lines; and

(ii) Serving as the single point of contact in helping parents to obtain the services and assistance they need.

(3) Case management is an active, ongoing process that involves—

(i) Assisting parents of eligible children in gaining access to the early intervention services and other services identified in the individualized family service plan;

(ii) Coordinating the provision of early intervention services and other services (such as medical services for other than diagnostic and evaluation purposes) that the child needs or is being provided;

(iii) Facilitating the timely delivery of available services; and

(iv) Continuously seeking the appropriate services and situations necessary to benefit the development of each child being served for the duration of the child's eligibility.

(b) *Specific case management activities.* Case management activities include—

(1) Coordinating the performance of evaluations and assessments;

(2) Facilitating and participating in the development, review, and evaluation of individualized family service plans;

(3) Assisting families in identifying available service providers;

(4) Coordinating and monitoring the delivery of available services;

(5) Informing families of the availability of advocacy services;

(6) Coordinating with medical and health providers; and

(7) Facilitating the development of a transition plan to pre-school services, if appropriate.

(c) *Employment and assignment of case managers.* (1) Case managers may be employed or assigned in any way that is permitted under State law, so long as it is consistent with the requirements of this part.

(2) A State's policies and procedures for implementing the statewide system of early intervention services must be designed and implemented to ensure that case managers are able to effectively carry out on an interagency basis the functions and services listed under paragraphs (a) and (b) of this section.

(d) *Qualifications of case managers.* Case managers must be persons who, consistent with § 303.344(g), have demonstrated knowledge and understanding about—

(1) Infants and toddlers who are eligible under this part;

(2) Part H of the Act and the regulations in this part; and

(3) The nature and scope of services available under the State's early intervention program, the system of payments for services in the State, and other pertinent information.

(Authority: 20 U.S.C. 1472(2))

Note: If States have existing case management systems, the States may use or adapt those systems, so long as they are consistent with the requirements of this part.

§ 303.7 Children.

As used in this part, "children" means "infants and toddlers with handicaps" as that term is defined in § 303.16.

(Authority: 20 U.S.C. 1472(1))

§ 303.8 Council.

As used in this part, "Council" means the State Interagency Coordinating Council.

(Authority: 20 U.S.C. 1472(4))

§ 303.9 Days.

As used in this part, "days" means calendar days.

(Authority: 20 U.S.C. 1471–1485)

§ 303.10 Developmental delay.

As used in this part, "developmental delay" has the meaning given to that term by a State under § 303.300.

(Authority: 20 U.S.C. 1472(3))

§ 303.11 Early intervention program.

As used in this part, "early intervention program" means the total effort in a State that is directed at meeting the needs of children eligible under this part and their families.

(Authority: 20 U.S.C. 1471 *et. seq.*)

§ 303.12 Early intervention services.

(a) *General.* As used in this part, "early intervention services" means services that—

(1) Are designed to meet the developmental needs of each child eligible under this part and the needs of the family related to enhancing the child's development;

(2) Are selected in collaboration with the parents;

(3) Are provided—

(i) Under public supervision;

(ii) By "qualified" personnel, as defined in § 303.21, including the types of personnel listed in paragraph (e) of this section.

(iii) In conformity with an individualized family service plan; and

(iv) At no cost, unless, subject to § 303.520(b)(3), Federal or State law provides a system of payments by families, including a schedule of sliding fees; and

(4) Meet the standards of the State, including the requirements of this part.

(b) *Location of services.* To the extent appropriate, early intervention services must be provided in the types of settings in which infants and toddlers without handicaps would participate.

(c) *General role of service providers.* To the extent appropriate, service providers in each area of early intervention services included in paragraph (d) of this section are responsible for—

(1) Consulting with parents, other service providers, and representatives of appropriate community agencies to ensure the effective provision of services in that area;

(2) Training parents and others regarding the provision of those services; and

(3) Participating in the multidisciplinary team's assessment of a child and child's family, and in the development of integrated goals and outcomes for the individualized family service plan.

(d) *Types of services; definitions.* Following are types of services included under "early intervention services," and, if appropriate, definitions of those services:

(1) "Audiology" includes—

(i) Identification of children with auditory impairment, using at risk criteria and appropriate audiologic screening techniques;

(ii) Determination of the range, nature, and degree of hearing loss and communication functions, by use of audiological evaluation procedures;

(iii) Referral for medical and other services necessary for the habilitation or rehabilitation of children with auditory impairment;

(iv) Provision of auditory training, aural rehabilitation, speech reading and listening device orientation and training, and other services;

(v) Provision of services for prevention of hearing loss; and

(vi) Determination of the child's need for individual amplification, including selecting, fitting, and dispensing appropriate listening and vibrotactile devices, and evaluating the effectiveness of those devices.

(2) "Case management services" means assistance and services provided by a case manager to a child eligible under this part and the child's family that are in addition to the functions and activities included under § 303.6.

(3) "Family training, counseling, and home visits" means services provided, as appropriate, by social workers, psychologists, and other qualified personnel to assist the family of a child eligible under this part in understanding the special needs of the child and enhancing the child's development.

(4) "Health services" (See § 303.13).

(5) "Medical services only for diagnostic or evaluation purposes" means services provided by a licensed physician to determine a child's developmental status and need for early intervention services.

(6) "Nursing services" includes—

(i) The assessment of health status for the purpose of providing nursing care, including the identification of patterns of human response to actual or potential health problems;

(ii) Provision of nursing care to prevent health problems, restore or improve functioning, and promote optimal health and development; and

(iii) Administration of medications, treatments, and regimens prescribed by a licensed physician.

(7) "Nutrition services" includes—

(i) Conducting individual assessments in—

(A) Nutritional history and dietary intake;

(B) Anthropometric, biochemical, and clinical variables;

(C) Feeding skills and feeding problems; and

(D) Food habits and food preferences;

(ii) Developing and monitoring appropriate plans to address the nutritional needs of children eligible under this part, based on the findings in paragraph (b)(7)(i) of this section; and

(iii) Making referrals to appropriate community resources to carry out nutrition goals.

(8) "Occupational therapy" includes services to address the functional needs of a child related to the performance of self-help skills, adaptive behavior and play, and sensory, motor, and postural development. These services are designed to improve the child's functional ability to perform tasks in home, school, and community settings, and include—

(i) Identification, assessment, and intervention;

(ii) Adaptation of the environment, and selection, design and fabrication of assistive and orthotic devices to facilitate development and promote the acquisition of functional skills; and

(iii) Prevention or minimization of the impact of initial or future impairment, delay in development, or loss of functional ability.

(9) "Physical therapy" includes—

(i) Screening of infants and toddlers to identify movement dysfunction;

(ii) Obtaining, interpreting, and integrating information appropriate to program planning, to prevent or alleviate movement dysfunction and related functional problems; and

(iii) Providing services to prevent or alleviate movement dysfunction and related functional problems.

(10) "Psychological services" includes—

(i) Administering psychological and developmental tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior, and child and family conditions related to learning, mental health, and development; and

(iv) Planning and managing a program of psychological services, including psychological counseling for children and parents, family counseling, consultation on child development, parent training, and education programs.

(11) "Social work services" includes—

(i) Making home visits to evaluate a child's living conditions and patterns of parent-child interaction;

(ii) Preparing a psychosocial developmental assessment of the child within the family context;

(iii) Providing individual and family-group counseling with parents and other family members, and appropriate social skill-building activities with the child and parents;

(iv) Working with those problems in a child's and family's living situation (home, community, and any center where early intervention services are provided) that affect the child's maximum utilization of early intervention services; and

(v) Identifying, mobilizing, and coordinating community resources and services to enable the child and family to receive maximum benefit from early intervention services.

(12) "Special instruction" includes—

(i) The design of learning environments and activities that promote the child's acquisition of skills in a variety of developmental areas, including cognitive processes and social interaction;

(ii) Curriculum planning, including the planned interaction of personnel, materials, and time and space, that leads to achieving the outcomes in the child's individualized family service plan;

(iii) Providing families with information, skills, and support related to enhancing the skill development of the child; and

(iv) Working with the child to enhance the child's development.

(13) "Speech-language pathology" includes—

(i) Identification of children with communicative or oral pharyngeal disorders and delays in development of communication skills, including the diagnosis and appraisal of specific disorders and delays in those skills;

(ii) Referral for medical or other professional services necessary for the habilitation or rehabilitation of children with communicative or oral pharyngeal disorders and delays in development of communication skills; and

(iii) Provision of services for the habilitation, rehabilitation, or prevention of communicative or oral pharyngeal disorders and delays in development of communication skills.

(14) "Transportation" (see § 303.23).

(e) *Qualified personnel.* Early intervention services must be provided by qualified personnel, including—

(1) Audiologists;
(2) Nurses;
(3) Nutritionists;
(4) Occupational therapists;
(5) Physical therapists;
(6) Physicians;
(7) Psychologists;
(8) Social workers;
(9) Special educators; and
(10) Speech and language pathologists.

(Authority: 20 U.S.C. 1472(2))

Note 1: With respect to the requirement in paragraph (b) of this section, the appropriate location of services for some infants and toddlers might be a hospital setting—during the period in which they require extensive medical intervention. However, for these and other eligible children, it is important that efforts be made to provide early intervention services in settings and facilities that do not remove the children from natural environments (e.g., the home, day care centers, or other community settings). Thus, it is recommended that services be community-based, and not isolate an eligible child or the child's family from settings or activities in which children without handicaps would participate.

Note 2: The list of services in paragraph (d) of this section is not exhaustive and may include other types of services, such as vision services, and the provision of respite and other family support services. There also are other types of personnel who may provide services under this part, including vision specialists, paraprofessionals, and parent-to-parent support personnel.

§ 303.13 Health services.

(a) As used in this part, "health services" means services necessary to enable a child to benefit from the other early intervention services under this part during the time that the child is receiving the other early intervention services.

(b) The term includes—

(1) Such services as clean intermittent catheterization, tracheotomy care, tube feeding, the changing of dressings or osteotomy collection bags, and other health services; and

(2) Consultation by physicians with other service providers concerning the special health care needs of eligible children that will need to be addressed in the course of providing other early intervention services.

(c) The term does not include the following:

(1) Services that are—

(i) Surgical in nature (such as cleft palate surgery, surgery for club foot, or the shunting of hydrocephalus); or

(ii) Purely medical in nature (such as hospitalization for management of congenital heart ailments, or the prescribing of medicine or drugs for any purpose).

(2) Devices necessary to control or treat a medical condition.

(3) Medical-health services (such as immunizations and regular "well-baby" care) that are routinely recommended for all children.

(Authority: 20 U.S.C. 1472(2))

Note: The definition in this section distinguishes between the health services that are required under this part, and the medical-health services that are not required. The IFSP requirements in Subpart D provide that, to the extent appropriate, these other medical-health services are to be included in the IFSP, along with the funding sources to be used in paying for the services. Identifying these services in the IFSP does not impose an obligation to provide the services if they are otherwise not required to be provided under this part. (See § 303.344(e), and the note following that section.)

§ 303.14 IFSP.

As used in this part, "IFSP" means the individualized family service plan, as that term is defined in § 303.340(b).

(Authority: 20 U.S.C. 1477)

§ 303.15 Include; including.

As used in this part, "include" or "including" means that the items named are not all of the possible items that are covered whether like or unlike the ones named.

(Authority: 20 U.S.C. 1484)

§ 303.16 Infants and toddlers with handicaps.

(a) As used in this part, "infants and toddlers with handicaps" means individuals from birth through age two who need early intervention services because they—

(1) Are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas:

(i) Cognitive development;

(ii) Physical development, including vision and hearing;

(iii) Language and speech development;

(iv) Psychosocial development; or

(v) Self-help skills; or

(2) Have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

(b) The term may also include, at a State's discretion, children from birth through age two who are at risk of having substantial developmental delays if early intervention services are not provided.

(Authority: 20 U.S.C. 1472(1))

Note 1: As used in paragraph (a)(2) of this section, "high probability" is not intended to be viewed as a statistical term. Rather, the phrase "have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay" applies to conditions with known etiologies and developmental consequences. Examples of these conditions include Down Syndrome and other chromosomal abnormalities, sensory impairments, including vision and hearing, inborn errors of metabolism, microcephaly, severe attachment disorders, including failure to thrive, seizure disorders, and fetal alcohol syndrome.

Note 2: With respect to paragraph (b) of this section, children who are at risk may be eligible under this part if a State elects to extend services to that population, even though they have not been identified as handicapped.

Under this provision, States have the authority to define who would be "at risk of having substantial developmental delays if early intervention services are not provided." In defining the "at risk" population, States may include well-known biological and other factors that can be identified during the neonatal period, and that place infants "at risk" for developmental delay. Commonly cited factors relating to infants include low birth weight, respiratory distress as a newborn, lack of oxygen, brain hemorrhage, and infection. It should be noted that these factors do not predict the presence of a barrier to development, but they may indicate children who are at higher risk of developmental delay than children without these problems.

§ 303.17 Multidisciplinary.

As used in this part, "multidisciplinary" means the involvement of two or more disciplines or professions in the provision of integrated and coordinated services, including evaluation and assessment activities in § 303.322, and development of the IFSP in § 303.342.

(Authority: 20 U.S.C. 1476(b)(3); 1477(a))

§ 303.18 Parent.

As used in this part, "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 303.405. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. 1477)

Note: The term "parent" has been defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom a child lives, as well as persons who are legally responsible for the child's welfare. The definition in this section is identical to the definition used in the Part B regulations (34 CFR 300.10.)

§ 303.19 Policies.

(a) As used in this part, "policies" means State statutes, regulations, Governor's orders, directives by the lead agency, or other written documents that represent the State's position concerning any matter covered under this part.

(b) State policies include—

(1) A State's commitment to develop and implement the statewide system (see § 303.148);

(2) A State's definition of "developmental delay" (see 303.303);

(3) A State's position regarding the provision of services to children who are at risk;

(4) A statement that—

(i) Provides that, subject to § 303.520(b)(3), services under this part will be provided at no cost to parents, except where a system of payments is provided for under Federal or State law; and

(ii) Sets out what fees (if any) will be charged for early intervention services, and the basis for those fees;

(5) A State's standards for personnel who provide services to children eligible under this part (see 303.361);

(6) A State's position and procedures related to contracting or making other arrangements with service providers under Subpart F; and

(7) Other positions that the State has adopted related to implementing any of the other requirements under this part.

(Authority: 20 U.S.C. 1471–1485)

§ 303.20 Public agency.

As used in this part, "public agency" includes the lead agency and any other political subdivision of the State that is responsible for providing early intervention services to children eligible under this part and their families.

(Authority: 20 U.S.C. 1471–1485)

§ 303.21 Qualified.

As used in this part, "qualified" means that a person has met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the person is providing early intervention services.

(Authority: 20 U.S.C. 1472(2))

Note: These regulations contain the following provisions relating to a State's responsibility to ensure that personnel are qualified to provide early intervention services:

1. Section 303.12(a)(4) provides that early intervention services must meet State standards. This provision implements a requirement that is similar to a longstanding provision under Part B of the Act (i.e., that the State educational agency establish standards and ensure that those standards are currently met for all programs providing special education and related services).
2. Section 303.12(a)(3)(ii) provides that early intervention services must be provided by qualified personnel.
3. Section 303.361 requires States to establish policies and procedures related to personnel standards.

§ 303.22 State.

Except as provided in § 303.200(b)(2), "State" means each of the 50 States, Puerto Rico, the District of Columbia, and the jurisdictions of Guam, American Samoa, the Virgin Islands, the Republic of Palau, and the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1402(a)(6))

§ 303.23 Transportation.

As used in this part, "transportation" includes the cost of travel (e.g., mileage, or travel by taxi, common carrier, or other means) and related costs (e.g., tolls and parking expenses) that are necessary to enable a child eligible under this part and the child's family to receive early intervention services.

(Authority: 20 U.S.C. 1472(2))

§ 303.24 EDGAR definitions that apply.

The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Award
Contract
Department
EDGAR
Fiscal year
Grant
Grantee
Grant period
Private
Public
Secretary

(Authority: 20 U.S.C. 1471 *et seq.*)

Subpart B—State Application for a Grant

General Requirements

§ 303.100 Conditions of assistance.

(a) In order to receive funds under this part for any fiscal year, a State shall—

(1) Have an approved application that contains the information required in this subpart for the year in which the State is applying; and

(2) Have on file with the Secretary the statement of assurances required under §§ 303.120 through 303.127.

(b) For years one through five, a State must submit an annual application. Thereafter, a State may submit a three-year application.

(Authority: 20 U.S.C. 1478)

§ 303.101 How the Secretary disapproves a State's application or statement of assurances.

The Secretary follows the procedures in 34 CFR 300.580 through 300.586 before disapproving a State's application or statement of assurances submitted under this part.

(Authority: 20 U.S.C. 1478)

Public Participation

§ 303.110 General requirements and timelines for public participation.

(a) Before submitting to the Secretary its application under this part, and before adopting a new or revised policy that is not in its current application, a State shall—

(1) Publish the application or policy in a manner that will ensure circulation throughout the State for at least a 60-day period, with an opportunity for comment on the application or policy for at least 30 days during that period;

(2) Hold public hearings on the application or policy during the 60-day period required in paragraph (a)(1) of this section; and

(3) Provide adequate notice of the hearings required in paragraph (a)(2) of this section at least 30 days before the dates that the hearings are conducted.

(b) A State may request an exemption from the timelines in paragraph (a) of this section if the State can demonstrate that—

(1) There are circumstances that would warrant such an exception; and

(2) The timelines that were followed provided an adequate opportunity for public participation and comment.

(Authority: 20 U.S.C. 1478(a)(4))

§ 303.111 Notice of public hearings and opportunity to comment.

The notice required in § 303.110(a)(3) must—

(a) Be published in newspapers or announced in other media, or both, with coverage adequate to notify the general public throughout the State about the hearings and opportunity to comment on the application or policy; and

(b) Be in sufficient detail to inform the public about—

(1) The purpose and scope of the State application or policy, and its relationship to Part H of the Act;

(2) The length of the comment period, and the date, time, and location of each hearing; and

(3) The procedures for providing oral comments or submitting written comments.

(Authority: 20 U.S.C. 1478(a)(4)(A))

§ 303.112 Public hearings.

Each State shall hold public hearings in a sufficient number and at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(Authority: 20 U.S.C. 1478(a)(4))

§ 303.113 Reviewing and reporting on public comments received.

(a) *Review of comments.* Before adopting its application, and before the adoption of a new or revised policy not in the application, the lead agency shall—

(1) Review and consider all public comments; and

(2) Make any modifications it deems necessary in the application or policy.

(b) *Reporting on comments to the Secretary.* In submitting the State's application or policy to the Secretary, the lead agency shall include—

(1) A summary of the public comments received as a result of the activities required in §§ 303.110 through 303.112;

(2) The State's responses to those comments; and

(3) Copies of news releases, advertisements, and announcements used to provide notice.

(Authority: 20 U.S.C. 1478(a))

Statement of Assurances

§ 303.120 General.

(a) A State's statement of assurances must contain the information required in §§ 303.121 through 303.127.

(b) Unless otherwise required by the Secretary, the statement is submitted only once, and remains in effect throughout the term of a State's participation under this part.

(c) A State may submit a revised statement of assurances if the statement is consistent with the requirements in §§ 303.121 through 303.127.

(Authority: 20 U.S.C. 1478(b))

§ 303.121 Reports and records.

The statement must provide for—

(a) Making reports in such form and containing such information as the Secretary may require; and

(b) Keeping records and affording access to those records as the Secretary may find necessary to assure compliance with the requirements of this part, the correctness and verification of reports, and the proper disbursement of funds provided under this part.

(Authority: 20 U.S.C. 1478(b)(4))

§ 303.122 Control of funds and property.

The statement must provide assurance satisfactory to the Secretary that—

(a) The control of funds provided under this part, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part; and

(b) A public agency administers the funds and property.

(Authority: 20 U.S.C. 1478(b)(3))

§ 303.123 Prohibition against commingling.

The statement must include an assurance satisfactory to the Secretary that funds made available under this part will not be commingled with the State funds.

(Authority: 20 U.S.C. 1478(b)(5)(A)

Note: As used in this part, "commingle" means depositing or recording funds in a general account without the ability to identify each specific source of funds for any expenditure. Under that general definition, it is clear that commingling is prohibited. However, to the extent that the funds from each of a series of Federal, State, local, and private funding sources can be identified—with a clear audit trail for each source—it is appropriate for those funds to be consolidated for carrying out a common purpose. In fact, a State may find it essential to set out a funding plan that incorporates, and accounts for, all sources of funds that can be targeted on a given activity or function related to the State's early intervention program.

Thus, the assurance in this section is satisfied by the use of an accounting system that includes an "audit trail" of the expenditure of funds awarded under this part. Separate bank accounts are not required.

§ 303.124 Prohibition against supplanting.

(a) The statement must include an assurance satisfactory to the Secretary that Federal funds made available under this part will be used to supplement and increase the level of State and local funds expended for children eligible under this part and their families and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section—

(1) The total amount of State and local funds budgeted for expenditures in the current fiscal year for early intervention services for children eligible under this part and their families must be at least equal to the total amount of State and local funds actually expended for early intervention services for these children and their families in the most recent preceding fiscal year for which the information is available. Allowance may be made for—

(i) Decreases in the number of children who are eligible to receive early intervention services under this part; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of facilities; and

(2) Funds under this part must not be used to displace State or local funds for any particular cost.

(Authority: 20 U.S.C. 1478(b)(5)(B))

Note: The nonsupplanting requirement in this section prohibits a State from supplanting State and local funds on either an aggregate basis or for a given expenditure. Thus, under Part H, whether supplanting has occurred is evaluated on the basis of two tests, as follows:

(1) First, whether State and local expenditures budgeted for the current fiscal year for early intervention services are at least equal to expenditures from the most recent fiscal year for which they are available. (This means that if a State spent $1,000,000 for early intervention services in FY–1, the State must budget at least $1,000,000 in FY–2, unless one of the conditions in paragraph (b)(1) of this section applies.).

(2) Second, whether Part H funds are used to pay for a particular activity that was previously supported with State or local funds. Thus, if a hospital-based project was supported entirely by State and local funds in FY–1, Part H funds could not be used to support that project in FY–2. However, to the extent that new services are added to the hospital project in FY–2, those new services could be paid for with Part H funds.

§ 303.125 Fiscal control.

The statement must provide assurance satisfactory to the Secretary that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part.

(Authority: 20 U.S.C. 1478(b)(6))

§ 303.126 Payor of last resort.

The statement must include an assurance satisfactory to the Secretary that the State will comply with the provisions in § 303.527, including the requirements on—

(a) Nonsubstitution of funds; and

(b) Non-reduction of other benefits.

(Authority: 20 U.S.C. 1478(b)(2))

§ 303.127 Assurance regarding expenditure of funds.

The statement must include an assurance satisfactory to the Secretary that the funds paid to the State under this part will be expended in accordance with the provisions of this part, including the requirements in § 303.3.

(Authority: 20 U.S.C. 1478(b)(1))

General Requirements for a State Application

§ 303.140 General.

A State's application under this part must contain the information required in §§ 303.141 through 303.146.

(Authority: 20 U.S.C. 1478(a))

§ 303.141 Information about the Council.

Each application must include information demonstrating that the State has established a State Interagency Coordinating Council that meets the requirements of Subpart G.

(Authority: 20 U.S.C. 1478(a)(2))

§ 303.142 Designation of lead agency.

Each application must include a designation of the lead agency in the State that will be responsible for the administration of funds provided under this part.

(Authority: 20 U.S.C. 1478(a)(1))

§ 303.143 Assurance regarding use of funds.

Each application must include an assurance that funds received under this part will be used to assist the State to plan, develop, and implement the statewide system required under Subparts D through F.

(Authority: 20 U.S.C. 1475, 1478(a) (2), (3))

§ 303.144 Description of use of funds.

(a) *General.* Each application must include a description of how a State proposes to use its funds under this part for the fiscal year covered by the application. The description must be presented separately for the lead agency and the Council, and include the information required in paragraphs (b) through (d) of this section.

(b) *Administrative positions.* Each application must include—

(1) A list of administrative positions, with salaries, and a description of the duties for each person whose salary is paid in whole or in part with funds awarded under this part; and

(2) For each position, the percentage of salary paid with those funds.

(c) *Planning, development, and implementation activities.* Each application must include—

(1) A description of the nature and scope of each major activity to be carried out under this part in planning, developing, and implementing the statewide system of early intervention services; and

(2) The approximate amount of funds to be spent for each activity.

(d) *Direct services.* (1) Each application must include a description of any direct services that the State expects to provide to eligible children and their families with funds under this part, consistent with §§ 303.521 and 303.527.

(2) The description must include information about each type of service to be provided, including—

(i) A summary of the methods to be used to provide the service (e.g., contracts or other arrangements with specified public or private organizations); and

(ii) The approximate amount of funds under this part to be used for the service.

(e) *Activities by other agencies.* If other agencies are to receive funds under this part, the application must include—

(1) The name of each agency expected to receive funds;

(2) The approximate amount of funds each agency will receive; and

(3) A summary of the purposes for which the funds will be used.

(Authority: 20 U.S.C. 1478 (a)(3), (a)(5))

§ 303.145 Information about public participation.

Each application must include the information on public participation that is required in § 303.113(b).

(Authority: 20 U.S.C. 1478(a)(4))

§ 303.146 Equitable distribution of resources.

(a) Each application must include a description of the procedures used by the State to ensure an equitable distribution of resources made available under this part among all geographic areas within the State.

(b) In determining equitable distribution of resources, a State must take into account the need for services across all geographical areas within the State.

(Authority: 20 U.S.C. 1478(a)(6))

Specific Application Requirements for Years One Through Five and Thereafter

§ 303.147 Application requirements for first and second years.

A State's annual application for the first and second years of participation under this part must contain the information required in §§ 303.141 through 303.146.

(Authority: 20 U.S.C. 1475; 1478(a))

§ 303.148 Third year applications.

(a) *General.* A State's third year application under this part must contain the following:

(1) The information required in §§ 303.141 through 303.146.

(2) Either—

(i) The information and assurances regarding the statewide system of early intervention services, as required in paragraph (b) of this section; or

(ii) If the State is eligible for a waiver, a request for a waiver, in accordance with the requirements in § 303.149.

(3) Other information that the Secretary may require.

(b) *Adoption of policy on statewide system.* Each third year application must include information and assurances demonstrating to the satisfaction of the Secretary that—

(1) It is the policy of the State to develop and implement a statewide, comprehensive, coordinated, interagency, multidisciplinary system for providing early intervention services to all children eligible under this part and their families;

(2) The policy in paragraph (b)(1) of this section incorporates all of the components of the statewide system of early intervention services that are required under this part; and

(3) Subject to § 303.341(a), the statewide system will be in effect no later than the beginning of the State's fourth year of participation under this part.

(Authority: 20 U.S.C. 1475(b); 1478(a))

§ 303.149 Waiver of the policy adoption requirement for the third year.

The Secretary may award a grant to a State under this part for the third year even if the State has not adopted the policy required in § 303.148(b), if the State, in its third year application, includes a statement requesting a waiver, including—

(a) Information demonstrating that the State has made a good faith effort to adopt a policy that meets the requirements in § 303.148 (b)(1) and (b)(2);

(b) The reasons why the State was unable to meet the timeline for policy adoption, and the steps remaining before the policy will be adopted; and

(c) An assurance that, except as provided in § 303.341(a), the policy required in § 303.148 (b)(1) and (b)(2) will be adopted and go into effect no later than the beginning of the State's fourth year of participation under this part.

(Authority: 20 U.S.C. 1475(b)(2))

Note: An example of when the Secretary may grant a waiver is a situation in which a State's policy is awaiting action by the State legislature, but the legislative session does not commence until after the State's application must be submitted.

§ 303.150 Fourth year applications.

A State's application for the fourth year of participation under this part must contain—

(a) The information required in §§ 303.141 through 303.146;

(b) Information and assurances to demonstrate that—

(1) The requirements in § 303.148 (b)(1) and (b)(2) are met; and

(2) Subject to § 303.341(a), the statewide system of early intervention services is in effect, or will be in effect no later than the beginning of the fourth year of the State's participation under this part;

(c) Information and assurances about each component of the statewide system, as required in §§ 303.160 through 303.175; and

(d) Other information that the Secretary may require.

(Authority: 20 U.S.C. 1475(b), 1478(a))

§ 303.151 States with mandates as of September 1, 1986 to serve children with handicaps from birth.

(a) Subject to the requirements in paragraph (b) of this section, a State that has in effect a State law, enacted before September 1, 1986, that requires the provision of a free appropriate public education to children with handicaps from birth through two is eligible for a grant under this part for the first through the fourth year of its participation.

(b) A State meeting the conditions in paragraph (a) of this section must—

(1) Have on file with the Secretary a statement of assurances containing the information required in §§ 303.121 through 303.127;

(2) Submit an annual application for years one through four that contains the information in §§ 303.141 through 303.146;

(3) Meet the public participation requirements in §§ 303.110 through 303.113; and

(4) Provide a copy of the State law that requires the provision of a free appropriate public education to children with handicaps from birth through age two.

(c) In order to receive funds under this part for the fifth and succeeding years, the State must submit an application that meets the requirements in § 303.152.

(Authority: 20 U.S.C. 1475(d))

§ 303.152 Applications for year five and each year thereafter.

(a) *Fifth year application.* A State's application for the fifth year of its participation under this part must contain—

(1) The information required in §§ 303.141 through 303.146, and 303.160 through 303.175;

(2) Information and assurances demonstrating to the satisfaction of the Secretary that the statewide system of early intervention services required in this part is in effect;

(3) A policy that, no later than the beginning of the fifth year of the State's participation, appropriate early intervention services will be available to all children in the State who are eligible under this part and their families;

(4) A description of the services to be provided no later than the beginning of the fifth year, in accordance with the timetables under § 303.302; and

(5) Other information that the Secretary may require.

(b) *Applications for succeeding years.* A State's applications for the succeeding years of participation under this program must contain information and assurances demonstrating to the satisfaction of the Secretary that the State will continue to meet all applicable conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1475(c); 1478(a); 1476(b)(2))

Application Requirements for Years Four, Five, and Thereafter Related to Components of a Statewide System

§ 303.160 State definition of developmental delay.

Each application must include the State's definition of "developmental delay." The definition must include the information required in § 303.300.

(Authority: 20 U.S.C. 1476(b)(1))

§ 303.161 Central directory.

Each application must include information and assurances demonstrating to the satisfaction of the Secretary that the State has developed a central directory of information that meets the requirements in § 303.301.

(Authority: 20 U.S.C. 1476(b)(7))

§ 303.162 Timetables for serving all eligible children.

Each application must include an assurance that the timetables required in § 303.302 have been established and will be met.

(Authority: 20 U.S.C. 1476(b)(2))

§ 303.163 Public awareness program.

Each application must include information and assurances demonstrating to the satisfaction of the Secretary that the State has established a public awareness program that meets the requirements in § 303.320.

(Authority: 20 U.S.C. 1476(b)(6))

§ 303.164 Comprehensive child find system.

Each application must include—

(a) The policies and procedures required in § 303.321(b);

(b) Information demonstrating that the requirements on coordination in § 303.321(c) are met;

(c) The referral procedures required in § 303.321(d), and either—

(1) A description of how the referral sources are informed about the procedures; or

(2) A copy of any memorandum or other document used by the lead agency to transmit the procedures to the referral sources; and

(d) The timelines in § 303.321(e).

(Authority: 20 U.S.C. 1476(b)(5))

§ 303.165 Evaluation, assessment, and nondiscriminatory procedures.

Each application must include information to demonstrate that the requirements in §§ 303.322 and 303.323 are met.

(Authority: 20 U.S.C. 1476(b)(3), 1477 (a)(1), (d)(2), (d)(3))

§ 303.166 Individualized family service plans.

Each application must include—

(a) An assurance that the IFSP requirements in § 303.341 will be met; and

(b) Information demonstrating that—

(1) The State's procedures for developing, reviewing, and evaluating IFSPs are consistent with the requirements in §§ 303.340, 303.342, 303.343, and 303.345; and

(2) The content of IFSPs used in the State is consistent with the requirements in § 303.344.

(Authority: 20 U.S.C. 1476(b)(4); 1477(d))

§ 303.167 Comprehensive system of personnel development (CSPD).

Each application must include the following:

(a) Information to show that the requirements in § 303.360(a) are met. A State meets this requirement by either—

(1) Incorporating the State's CSPD procedures under Part B of the Act (34 CFR 300.380 through 300.387); or

(2) Including procedures that the State has developed.

(b) An assurance that the State's personnel development system will meet the requirements in § 303.360(b).

(Authority: 20 U.S.C. 1476(b)(8))

§ 303.168 Personnel standards.

(a) Each application must include policies and procedures that are consistent with the requirements in § 303.361.

(Authority: 20 U.S.C. 1476(b)(13))

§ 303.169 Procedural safeguards.

Each application must include procedural safeguards that—

(a) Are consistent with §§ 303.400 through 303.405, 303.420 through 303.425, and 303.460; and

(b) Incorporate either—

(1) The due process procedures in 34 CFR 300.506 through 300.512; or

(2) The procedures that the State has developed to meet the requirements in §§ 303.420(b) and 303.421 through 303.425.

(Authority: 20 U.S.C. 1476(b)(12))

§ 303.170 Supervision and monitoring of programs.

Each application must include information to show that the requirements in § 303.501 are met.

(Authority: 20 U.S.C. 1476(b)(9)(A))

§ 303.171 Lead agency procedures for resolving complaints.

Each application must include procedures that are consistent with the requirements in §§ 303.510 through 303.512.

(Authority: 20 U.S.C. 1476(b)(9))

§ 303.172 Policies and procedures related to financial matters.

Each application must include—

(a) Funding policies that meet the requirements in §§ 303.520 and 303.521;

(b) Information about funding sources, as required in § 303.522;

(c) Procedures to ensure the timely delivery of services, in accordance with § 303.525; and

(d) A procedure related to the timely reimbursement of funds under this part, in accordance with §§ 303.527(b) and 303.528.

(Authority: 20 U.S.C. 1476(b)(9)(D), (E); (b)(11); 1481)

§ 303.173. Interagency agreements; resolution of individual disputes.

Each application must include—

(a) A copy of each interagency agreement that has been developed under § 303.523; and

(b) Information to show that the requirements in § 303.524 are met.

(Authority: 20 U.S.C. 1476(b)(9)(E))

§ 303.174 Policy for contracting or otherwise arranging for services.

Each application must include a policy that meets the requirements in § 303.526.

(Authority: 20 U.S.C. 1476(b)(10))

§ 303.175 Data collection.

Each application must include procedures that meet the requirements in § 303.540.

(Authority: 20 U.S.C. 1476(b)(14))

Participation by the Secretary of the Interior

§ 303.180 Eligibility of the Secretary of the Interior for assistance.

(a) The Secretary is authorized to make payments to the Secretary of the Interior according to the need for assistance for the provison of early intervention services to children with handicaps and their families on reservations served by the elementary and secondary schools operated for Indians by the Department of the Interior.

(b) The Secretary of the Interior may receive an award under this part only after submitting an application that—

(1) Meets the conditions of assistance required by § 303.100; and

(2) Is approved by the Secretary.

(Authority: 20 U.S.C. 1484(b))

Subpart C—Procedures for Making Grants to States

§ 303.200 Formula for State allocations.

(a) For each fiscal year, from the aggregate amount of funds available under this part for distribution to the States, the Secretary allots to each State an amount that bears the same ratio to the aggregate amount as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States.

(b) For the purpose of allotting funds to the States under paragraph (a) of this section—

(1) "Aggregate amount" means the amount available for distribution to the States after the Secretary determines the amount of payments to be made to the Secretary of the Interior under § 303.203 and to the jurisdictions under § 303.204;

(2) "Infants and toddlers" means children from birth through age two in the general population, based on the most recently satisfactory data as determined by the Secretary; and

(3) "State" means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1484(c))

§ 303.201 Distribution of allotments from non-participating States.

If a State elects not to receive its allotment, the Secetary reallots those funds among the remaining States, in accordance with § 303.200(a).

(Authority: 20 U.S.C. 1484(d))

§ 303.202 Minimum grant that a State may receive.

No State receives less than 0.5 percent of the aggregate amount available under § 303.200.

(Authority: 20 U.S.C. 1484(d))

§ 303.203 Payments to the Secretary of the Interior.

Subject to § 303.180(a), the amount of payment to the Secretary of the Interior for any fiscal year is 1.25 percent of the aggregate amount available to States after the Secretary determines the amount of payments to be made to the jurisdictions under § 303.204.

(Authority: 20 U.S.C. 1484(b))

§ 303.204 Payments to the jurisdictions.

From the sums appropriated to carry out this part for any fiscal year, the Secretary may reserve up to 1 percent for payments to the jurisdictions listed in § 303.2 in accordance with their respective needs.

(Authority: 20 U.S.C. 1484(a))

Subpart D—Program and Service Components of a Statewide System of Early Intervention Services

General

§ 303.300 State definition of developmental delay.

Each statewide system of early intervention services (system) must include the definition of "developmental delay" that will be used by the State in carrying out programs under this part. The State's definition must—

(a) Specify that a child may be determined to be eligible if the child has a delay, in accordance with paragraphs (b) and (c) of this section, in one or more of the following developmental areas: Cognitive development; physical development, including vision and hearing; language and speech development; psychosocial development; or self-help skills;

(b) Designate the levels of functioning, or other criteria, that will be used in determining a child's eligibility as a result of developmental delay; and

(c) Describe the procedures the State will use to determine the existence of a developmental delay in each developmental area included in paragraph (a) of this section.

(Authority: 20 U.S.C. 1472(1), 1476(b)(1))

Note: Under § 303.322(c)(3), States are required to ensure that informed clinical opinion is used in determining a child's eligibility under this part. Informed clinical opinion is especially important if there are no standardized measures, or the standardized procedures are not appropriate for a given age or developmental area. If a given standardized procedure is considered to be appropriate, a State's criteria could include percentiles or percentages of levels of functioning on standardized measures.

§ 303.301 Central directory.

(a) Each system must include a central directory of information about—

(1) Public and private early intervention services, resources, and experts available in the State;

(2) Research and demonstration projects being conducted in the State; and

(3) Professional and other groups that provide assistance to children eligible under this part and their families.

(b) The information required in paragraph (a) of this section must be in sufficient detail to—

(1) Ensure that the general public will be able to determine the nature and scope of the services and assistance available from each of the sources listed in the directory; and

(2) Enable the parent of a child eligible under this part to contact, by telephone or letter, any of the sources listed in the directory.

(c) The central directory must be—

(1) Updated at least annually; and

(2) Accessible to the general public.

(d) To meet the requirements in paragraph (c)(2) of this section, the lead agency shall arrange for copies of the directory to be available—

(1) In each geographic region of the State, including rural areas; and

(2) In places and a manner that ensure accessibility by persons who are handicapped.

(Authority: 20 U.S.C. 1476(b)(7))

Note: Examples of appropriate groups that provide assistance to eligible children and their families include parent support groups and advocate associations.

§ 303.302 Timetables for serving all eligible children.

Each system must include timetables for ensuring that appropriate early intervention services will be available to all infants and toddlers with handicaps no later than the beginning of the fifth year of the State's participation under this part.

(Authority: 20 U.S.C. 1476(b)(2))

Identification and Evaluation

§ 303.320 Public awareness program.

Each system must include a public awareness program that focuses on the early identification of children who are eligible to receive early intervention services under this part. The public awareness program must provide for informing the public about—

(a) The State's early intervention program;

(b) The child find system, including—

(1) The purpose and scope of the system;

(2) How to make referrals; and

(3) How to gain access to a comprehensive, multidisciplinary evaluation and other early intervention services; and

(c) The central directory.

(Authority: 20 U.S.C. 1476(b)(6))

Note 1: An effective public awareness program is one that does the following:

1. Provides a continuous, ongoing effort that is in effect throughout the State, including rural areas;

2. Provides for the involvement of, and communication with, major organizations throughout the State that have a direct interest in this part, including public agencies at the State and local level, private providers, professional associations, parent groups, advocate associations, and other organizations;

3. Has coverage broad enough to reach the general public, including those who are handicapped; and

4. Includes a variety of methods for informing the public about the provisions of this part.

Note 2: Examples of methods for informing the general public about the provisions of this part include: (1) Use of television, radio, and newspaper releases, (2) pamphlets and posters displayed in doctor's offices, hospitals, and other appropriate locations, and (3) the use of a toll-free telephone service.

§ 303.321 Comprehensive child find system.

(a) *General.* (1) Each system must include a comprehensive child find system that is consistent with Part B of the Act (see 34 CFR 300.128), and meets the requirements in paragraphs (b) through (e) of this section.

(2) The lead agency, with the advice and assistance of the Council, shall be responsible for implementing the child find system.

(b) *Procedures.* The child find system must include the policies and procedures that the State will follow to ensure that—

(1) All infants and toddlers in the State who are eligible for services under this part are identified, located, and evaluated; and

(2) An effective method is developed and implemented to determine which children are receiving needed early intervention services, and which children are not receiving those services.

(c) *Coordination.* (1) The lead agency, with the assistance of the Council, shall ensure that the child find system under this part is coordinated with all other major efforts to locate and identify children conducted by other State agencies responsible for administering the various education, health, and social service programs relevant to this part, including efforts in the—

(i) Assistance to States Program under Part B of the Act;

(ii) Maternal and Child Health program under Title V of the Social Security Act;

(iii) Medicaid's Early Periodic Screening, Diagnosis and Treatment (EPSDT) program under Title XIX of the Social Security Act;

(vi) Developmental Disabilities Assistance and Bill of Rights Act; and

(v) Head Start Act.

(2) The lead agency, with the advice and assistance of the Council, shall take steps to ensure that—

(i) There will not be unnecessary duplication of effort by the various agencies involved in the State's child find system under this part; and

(ii) The State will make use of the resources available through each public agency in the State to implement the child find system in an effective manner.

(d) *Referral procedures.* (1) The child find system must include procedures for use by primary referral sources for referring a child to the appropriate public agency within the system for—

(i) Evaluation and assessment, in accordance with §§ 303.322 and 303.323; or

(ii) As appropriate, the provision of services, in accordance with § 303.342(a) or § 303.345.

(2) The procedures required in paragraph (b)(1) of this section must—

(i) Provide for an effective method of making referrals by primary referral sources; and

(ii) Ensure that referrals are made no more than two working days after a child has been identified.

(3) As used in paragraph (d)(1) of this section, "primary referral sources" includes—

(i) Hospitals, including prenatal and postnatal care facilities;

(ii) Physicians;

(iii) Parents;

(iv) Day care programs;

(v) Local educational agencies;

(vi) Public health facilities;

(vii) Other social service agencies; and

(viii) Other health care providers.

(e) *Timelines for public agencies to act on referrals.* Once the public agency receives a referral, it shall, within 45 days—

(i) Complete the evaluation and assessment activities in § 303.322; and

(ii) Hold an IFSP meeting, in accordance with § 303.342.

(Authority: 20 U.S.C. 1476(b)(5))

Note: In developing the child find system under this part, States should consider (1) tracking systems based on high-risk conditions at birth, and (2) other activities that are being conducted by various agencies or organizations in the State.

§ 300.322 Evaluation and assessment.

(a) *General.* (1) Each system must include the performance of a timely, comprehensive, multidisciplinary evaluation of each child, birth through age two, referred for evaluation, including assessment activities related to the child and the child's family.

(2) The lead agency shall be responsible for ensuring that the requirements of this section are implemented by all affected public agencies and service providers in the State.

(b) *Definitions of evaluation and assessment.* As used in this part—

(1) "Evaluation" means the procedures used by appropriate qualified personnel to determine a child's initial and continuing eligibility under this part, consistent with the definition of "infants and toddlers with handicaps" in § 303.16, including determining the status of the child in each of the developmental areas in paragraph (c)(3)(ii) of this section.

(2) "Assessment" means the ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility under this part to identify—

(i) The child's unique needs.

(ii) The family's strengths and needs related to development of the child; and

(iii) The nature and extent of early intervention services that are needed by the child and the child's family to meet the needs in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(c) *Evaluation and assessment of the child.* The evaluation and assessment of each child must—

(1) Be conducted by personnel trained to utilize appropriate methods and procedures;

(2) Be based on informed clinical opinion; and

(3) Include the following:

(i) A review of pertinent records related to the child's current health status and medical history.

(ii) An evaluation of the child's level of functioning in each of the following developmental areas:

(A) Cognitive development.

(B) Physical development, including vision and hearing.

(C) Language and speech development.

(D) Psychosocial development.

(E) Self-help skills.

(iii) An assessment of the unique needs of the child in terms of each of the developmental areas in paragraph (c)(3)(ii) of this section, including the identification of services appropriate to meet those needs.

(d) *Family assessment.* (1) Family assessments under this part must be designed to determine the strengths and needs of the family related to enhancing the development of the child.

(2) Any assessment that is conducted must be voluntary on the part of the family.

(3) If an assessment of the family is carried out, the assessment must—

(i) Be conducted by personnel trained to utilize appropriate methods and procedures;

(ii) Be based on information provided by the family through a personal interview; and

(iii) Incorporate the family's description of its strengths and needs related to enhancing the child's development.

(e) *Timelines.* (1) Except as provided in paragraph (e)(2) of this section, the evaluation and initial assessment of each child (including the family assessment) must be completed within the 45-day time period required in § 303.321(e).

(2) The lead agency shall develop procedures to ensure that in the event of exceptional circumstances that make it impossible to complete the evaluation and assessment within 45 days (e.g., if a child is ill), public agencies will—

(i) Document those circumstances; and

(ii) Develop and implement an interim IFSP, to the extent appropriate and consistent with § 303.345 (b)(1) and (b)(2).

(Authority: 20 U.S.C. 1476(b)(3), 1477 (a)(1), (d)(2), (d)(3))

Note: This section combines into one overall requirement the provisions on evaluation and assessment under the following sections of the Act: (1) Section 676(b)(3) (timely, comprehensive, multidisciplinary evaluation), and (2) Section 677(a)(1) (multidisciplinary assessment).

The section also requires that the evaluation-assessment process be broad enough to obtain information required in the IFSP concerning (1) the family's strengths and needs related to the development of the child (section 677(d)(2)), and (2) the child's functioning level in each of the five developmental areas (section 677(d)(1)).

§ 303.323 Nondiscriminatory procedures.

Each lead agency shall adopt nondiscriminatory evaluation and assessment procedures. The procedures must provide that public agencies responsible for the evaluation and assessment of children and families under this part shall ensure, at a minimum, that—

(a) Tests and other evaluation materials and procedures are administered in the native language of the parents or other mode of communication, unless it is clearly not feasible to do so;

(b) Any assessment and evaluation procedures and materials that are used are selected and administered so as not to be racially or culturally discriminatory;

(c) No single procedure is used as the sole criterion for determining a child's eligibility under this part; and

(d) Evaluations and assessments are conducted by qualified personnel.

(Authority: 20 U.S.C. 1476(b)(3), 1477 (a)(1), (d)(2), (d)(3))

Individualized Family Service Plans (IFSPs)

§ 303.340 General.

(a) Each system must include policies and procedures regarding individualized family service plans (IFSPs) that meet the requirements of this section and §§ 303.341 through 303.346.

(b) As used in this part, "individualized family service plan" and "IFSP" mean a written plan for providing early intervention services to a child eligible under this part and the child's family. The plan must—

(1) Be developed jointly by the family and appropriate qualified personnel involved in the provision of early intervention services;

(2) Be based on the multidisciplinary evaluation and assessment of the child, and the assessment of the child's family, as required in § 303.322; and

(3) Include services necessary to enhance the development of the child and the capacity of the family to meet the special needs of the child.

Lead agency responsibility. The lead agency shall ensure that an IFSP is developed and implemented for each eligible child, in accordance with the requirements of this part. If there is a dispute between agencies as to who has responsibility for developing or implementing an IFSP, the lead agency shall resolve the dispute, or assign responsibility.

(Authority: 20 U.S.C. 1477)

Note: In instances where an eligible child must have both an IFSP and an individualized service plan under another Federal program, it may be possible to develop a single consolidated document, provided that it (1) contains all of the required information in § 303.344, and (2) is developed in accordance with the requirements of this part.

§ 303.341 Meeting the IFSP requirements for years four and five.

(a) *Fourth year requirements.* No later than the beginning of the fourth year of a State's participation under this part, the State shall ensure that—

(1) Evaluations and assessments are conducted in accordance with § 303.322

(2) An IFSP is developed, in accordance with §§ 303.342(a) and 303.343 (a), for each child determined to be eligible under this part and the child's family; and

(3) Case management services are available to each eligible child and the child's family.

(b) *Requirements for the fifth year.* No later than the beginning of the fifth year of a State's participation under this part, a current IFSP must be in effect and implemented for each eligible child and the child's family.

(Authority: 20 U.S.C. 1476 (b)(2), (b)(4), 1477 (a)(2), (c))

§ 303.342 Procedures for IFSP development, review, and evaluation.

(a) *Meeting to develop initial IFSP; timelines.* For a child who has been evaluated for the first time and determined to be eligible, a meeting to develop the initial IFSP must be conducted within the 45 day time period in § 303.321(e).

(b) *Periodic review.* (1) A review of the IFSP for a child and the child's family must be conducted every six months, or more frequently if conditions warrant, or if the family requests such a review. The purpose of the periodic review is to determine—

(i) The degree to which progress toward achieving the outcomes is being made; and

(ii) Whether modification or revision of the outcomes or services is necessary.

(2) The review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

(c) *Annual meeting to evaluate the IFSP.* A meeting must be conducted on at least an annual basis to evaluate the IFSP for a child and the child's family, and, as appropriate, to revise its provisions. The results of any current evaluations conducted under § 303.322(c), and other information available from the ongoing assessment of the child and family, must be used in determining what services are needed and will be provided.

(d) *Accessibility and convenience of meetings.* (1) IFSP meetings must be conducted—

(i) In settings and at times that are convenient to families; and

(ii) In the native language of the family or other mode of communication used by the family, unless it is clearly not feasible to do so.

(2) Meeting arrangements must be made with, and written notice provided to, the family and other participants early enough before the meeting date to ensure that they will be able to attend.

(Authority: 20 U.S.C. 1477)

Note: The requirement for the annual evaluation incorporates the periodic review process. Therefore, it is necessary to have only one separate periodic review each year (i.e., six months after the initial and subsequent annual IFSP meetings), unless conditions warrant otherwise.

Because the needs of infants and toddlers change so rapidly during the course of a year, certain evaluation procedures may need to be repreated before conducting the periodic reviews and annual evaluation meetings in paragraphs (b) and (c) of this section.

§ 303.343 Participants in IFSP meetings and periodic reviews.

(a) *Initial and annual IFSP meetings.* (1) Each initial meeting and each annual meeting to evaluate the IFSP must include the following participants:

(i) The parent or parents of the child.

(ii) Other family members, as requested by the parent, if feasible to do so;

(iii) An advocate or person outside of the family, if the parent requests that the person participate.

(iv) The case manager that has been working with the family since the initial referral of the child for evaluation, or that has been designated by the public agency to be responsible for implementation of the IFSP.

(v) A person or persons directly involved in conducting the evaluations and assessments in § 303.322.

(vi) As appropriate, persons who will be providing services to the child or family.

(2) If a person listed in paragraph (a)(1)(v) of this section is unable to attend a meeting, arrangements must be made for the person's involvement through other means, including—

(i) Participating in a telephone conference call;

(ii) Having a knowledgeable authorized representative attend the meeting; or

(iii) Making pertinent records available at the meeting.

(b) *Periodic review.* Each periodic review must provide for the participation of persons in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. If conditions warrant, provisions must be made for the participation of other representatives identified in paragraph (a) of this section.

(Authority: 20 U.S.C. 1477(b))

§ 303.344 Content of IFSP.

(a) *Information about the child's status.* (1) The IFSP must include a statement of the child's present levels of physical development (including vision, hearing, and health status), cognitive development, language and speech development, psychosocial development, and self-help skills.

(2) The statement in paragraph (a)(1) of this section must be based on professionally acceptable objective criteria.

(b) *Family information.* With the concurrence of the family, the IFSP must include a statement of the family's strengths and needs related to enhancing the development of the child.

(c) *Outcomes.* The IFSP must include a statement of the major outcomes expected to be achieved for the child and family, and the criteria, procedures, and timelines used to determine—

(1) The degree to which progress toward achieving the outcomes is being made; and

(2) Whether modifications or revisions of the outcomes or services are necessary.

(d) *Early intervention services.* (1) The IFSP must include a statement of the specific early intervention services necessary to meet the unique needs of the child and the family to achieve the outcomes identified in paragraph (c) of this section, including—

(i) The frequency, intensity, location, and method of delivering the services; and

(ii) The payment arrangements, if any.

(2) As used in paragraph (d)(1)(i) of this section—

(i) "Frequency" and "intensity" mean the number of days or sessions that a service will be provided, the length of time the service is provided during each session, and whether the service is provided on an individual or group basis;

(ii) "Location" means, subject to § 303.12(b), where a service is provided (e.g., in the child's home, early intervention centers, hospitals and clinics, or other settings, as appropriate to the age and needs of the individual child); and

(iii) "Method" means how a service is provided.

(e) *Other services.* (1) To the extent appropriate, the IFSP must include—

(i) Medical and other services that the child needs, but that are not required under this part; and

(ii) If necessary, the steps that will be undertaken to secure those services through public or private resources.

(2) The requirement in paragraph (e)(1) of this section does not apply to routine medical services (e.g., immunizations and "well-baby" care), unless a child needs those services and the services are not otherwise available or being provided.

(f) *Dates; duration of services.* The IFSP must include the projected dates for initiation of the services in paragraph (d)(1) of this section, and the anticipated duration of those services.

(g) *Case manager.* (1) The IFSP must include the name of the case manager from the profession most immediately relevant to the child's or family's needs, who will be responsible for the implementation of the IFSP and coordination with other agencies and persons.

(2) In meeting the requirements in paragraph (g)(1) of this section, the public agency may—

(i) Assign the same case manager to be responsible for implementing a child's and family's IFSP who was appointed at the time that the child was initially referred for evaluation; or

(ii) Appoint a new case manager.

(3) As used in paragraph (g)(1) of this section, the term "profession" includes "case management."

(h) *Transition at age three.* (1) The IFSP must include the steps to be taken to support the transition of the child, upon reaching age three, to—

(i) Preschool services under Part B of the Act, to the extent that those services are considered appropriate; or

(ii) Other services that may be available, if appropriate.

(2) The steps required in paragraph (h)(1) of this section include—

(i) Discussions with, and training of, parents regarding future placements and other matters related to the child's transition;

(ii) Procedures to prepare the child for changes in service delivery, including steps to help the child adjust to, and function in, a new setting; and

(iii) With parental consent, the transmission of information about the child to the local educational agency, to ensure continuity of services, including evaluation and assessment information required in § 303.322, and copies of IFSPs that have been developed and implemented in accordance with §§ 303.340 through 303.346.

(Authority: 20 U.S.C. 1477(d))

Note 1: Throughout the process of developing and implementing IFSPs for an eligible child and the child's family, it is important for agencies to recognize the variety of roles that family members play in enhancing the child's development. It also is important that the degree to which the needs of the family are addressed in the IFSP process are determined in a collaborative manner with the full agreement and participation of the parents of the child. Parents retain the ultimate decision in determining whether they, their child, or other family members will accept or decline services under this part.

Note 2: The early intervention services in paragraph (d) of this section are those services that a State is required to provide to a child in accordance with § 303.12.

The "other services in paragraph (e) of this section are services that a child or family needs, but that are neither required nor covered under this part. While listing the non-required services in the IFSP does not mean that those services must be provided, their identification can be helpful to both the child's family and the case manager, for the following reasons: First, the IFSP would provide a comprehensive picture of the child's total service needs (including the need for medical and health services, as well as early intervention services). Second, it is appropriate for the case manager to assist the family in securing the non-required services (e.g., by (1) determining if there is a public agency that could provide financial assistance, if needed, (2) assisting in the preparation of eligibility claims or insurance claims, if needed, and (3) assisting the family in seeking out and arranging for the child to receive the needed medical-health services).

Thus, to the extent appropriate, it is important for a State's procedures under this part to provide for ensuring that other needs of the child, and of the family related to enhancing the development of the child, such as medical and health needs, are considered and addressed, including determining (1) who will provide each service, and when, where, and how it will be provided, and (2) how the service will be paid for (e.g., through private insurance, an existing Federal-State funding source, such as Medicaid or EPSDT, or some other funding arrangement).

Note 3: Although the IFSP must include information about each of the items in paragraphs (b) through (h) of this section, this does not mean that the IFSP must be a detailed, lengthy document. It might be a brief outline, with appropriate attachments that address each of the points in the paragraphs under this section. It is important for the IFSP itself to be clear about (a) what services are to be provided, (b) the actions that are to be taken by the case manager in initiating those services, and (c) what actions will be taken by the parents.

Note 4: It is important for the lead agency to take steps to ensure a smooth and effective transition of children eligible under this part to special education and related services under Part B of the Act. This is especially critical if the lead agency and the State educational agency (SEA) are not the same agency in a State. In this situation, agreement between the two agencies regarding the responsibilities of each agency during the transition period is very important. Agreements could be in the form of existing or new interagency agreements. Examples of important areas that might be addressed in such agreements include the following:

1. The assignment of financial and other responsibilities during transition, including the (a) performance of evaluations, (b) development of individualized education programs (IEPs) that meet the requirements in 34 CFR 300.340 through 300.349, if appropriate, and (c) provision of services on a continuous, uninterrupted basis.

2. Procedures to ensure a smooth transfer of responsibilities from local service providers to local educational agencies (LEAs), including any requirements for continued services under this part that are the responsibility of the LEAs.

3. Other provisions necessary to ensure effective transition of children under this part to preschool services under Part B of the Act. Agreements that are made between the two agencies need to be flexible enough to ensure that gaps in services will not occur.

§ 303.345 Provision of services before evaluation and assessment are completed.

Early intervention services for an eligible child and the child's family may commence before the completion of the evaluation and assessment in § 303.322, if the following conditions are met:

(a) Parental consent is obtained.

(b) An interim IFSP is developed that includes—

(1) The name of the case manager who will be responsible, consistent with § 303.344(g), for implementation of the interim IFSP and coordination with other agencies and persons; and

(2) The early intervention services that have been determined to be needed immediately by the child and the child's family.

(c) The evaluation and assessment are completed within the time period required in § 303.322(e).

(Authority: 20 U.S.C. 1477(c))

Note: This section is intended to accomplish two specific purposes: (1) To facilitate the provision of services in the event that a child has obvious immediate needs that are identified, even at the time of referral (e.g., a physician recommends that a child with cerebral palsy begin receiving physical therapy as soon as possible); and (2) to ensure that the requirements for the timely evaluation and assessment are not circumvented.

§ 303.346 Responsibility and accountability.

Each agency or person who has a direct role in the provision of early intervention services is responsible for making a good faith effort to assist each eligible child in achieving the outcomes in the child's IFSP. However, Part H of the Act does not require that any agency or person be held accountable if an eligible child does not achieve the growth projected in the child's ISFP.

(Authority: 20 U.S.C. 1477)

Personnel Training and Standards

§ 303.360 Comprehensive system of personnel development.

(a) Each system must include a comprehensive system of personnel development. Subject to paragraph (b) of this section, a State's current personnel development system required under Part B of the Act (34 CFR 300.380 through 300.387) may be used to satisfy this requirement.

(b) The personnel development system under this part must—

(1) Provide for preservice and inservice training to be conducted on an interdisciplinary basis, to the extent appropriate;

(2) Provide for the training of a variety of personnel needed to meet the requirements of this part, including public and private providers, primary referral sources, paraprofessionals, and persons who will serve as case managers; and

(3) Ensure that the training provided relates specifically to—

(i) Meeting the interrelated psychosocial, health, developmental, and educational needs of eligible children under this part; and

(ii) Assisting families in enhancing the development of their children, and in participating fully in the development and implementation of IFSPs.

(Authority: 20 U.S.C. 1476(b)(8))

§ 303.361 Personnel standards.

(a) As used in this part—

(1) "Appropriate professional requirements in the State" means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing early intervention services; and

(ii) Establish suitable qualifications for personnel providing early intervention services under this part to eligible children and their families, who are served by State, local, and private agencies.

(2) "Highest requirements in the State applicable to a specific profession or discipline" means the highest entry-level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) "Profession or discipline" means a specific occupational category that—

(i) Provides early intervention services to children eligible under this part and their families;

(ii) Has been established or designated by the State; and

(iii) Has a required scope of responsibility and degree of supervision.

(4) "State approved or recognized certification, licensing, registration, or other comparable requirements" means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b)(1) Each statewide system must have policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(2) The policies and procedures required in paragraph (b)(1) of this section must provide for the establishment and maintenance of standards that are consistent with any State approved or recognized certification, licensing, or other comparable requirements that apply to the profession or discipline in which a person is providing early intervention services.

(c) To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State's application for assistance under this part must include the steps the State is taking, the procedures for notifying public agencies and personnel of those steps, and the timelines it has established for the retraining or hiring of personnel that meet appropriate professional requirements in the State.

(d)(1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing early intervention services, whether the applicable standards are consistent with the highest requirements in the State for that profession or descipline.

(2) The information required in paragraph (d)(1) of this section must be on file in the lead agency, and available to the public.

(e) In identifying the "highest requirements in the State" for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children eligible under this part and their families must be considered.

(Authority: 20 U.S.C. 1476(b)(13))

Note: This section requires that a State use its own existing highest requirements to determine the standards appropriate to personnel who provide early intervention services under this part. The regulations do not require States to set any specified training standard, such as a master's degree, for employment of personnel who provide services under this part.

The regulations permit each State to determine the specific occupational categories required to provide early intervention services to children eligible under this part and their families, and to revise or expand these categories as needed. The professions or disciplines need not be limited to traditional occupational categories.

Subpart E—Procedural Safeguards

General

§ 303.400 General responsibility of lead agency for procedural safeguards.

Each lead agency shall be responsible for—

(a) Establishing or adopting procedural safeguards that meet the requirements of this subpart, and

(b) Ensuring effective implementation of the safeguards by each public agency in the State that is involved in the provision of early intervention services under this part.

(Authority: 20 U.S.C. 1480)

§ 303.401 Definitions of consent, native language, and personally identifiable information.

As used in this subpart—

(a) "Consent" means that—

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time;

(b) "Native language," when used with reference to persons of limited English proficiency, means the language or mode of communication normally used by the parent of a child eligible under this part;

(c) "Personally identifiable" means that information includes—

(1) The name of the child, the child's parent, or other family member;

(2) The address of the child;

(3) A personal identifier, such as the child's or parent's social security number; or

(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1480)

§ 303.402 Opportunity to examine records.

In accordance with the confidentiality procedures in the regulations under Part B of the Act (CFR 300.560 through 300.576), the parents of a child eligible under this part must be afforded the opportunity to inspect and review records relating to evaluations and assessments, eligibility determination, development and implementation of IFSPs, individual complaints dealing with the child, and any other area under this part involving records about the child and the child's family.

(Authority: 20 U.S.C. 1480(3))

§ 303.403 Prior notice; native language.

(a) *General.* Written prior notice must be given to the parents of a child eligible under this part a reasonable time before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family.

(b) *Consent of notice.* The notice must be in sufficient detail to inform the parents about—

(1) The action that is being proposed or refused;

(2) The reasons for taking the action; and

(3) All procedural safeguards that are available under this part.

(c) *Native language.* (1) The notice must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parents, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency, or designated service provider, shall take steps to ensure that—

(i) The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

(ii) The parent understands the notice; and

(iii) There is written evidence that the requirements of this paragraph have been met.

(3) If a parent is deaf or blind, or has no written language, the mode of communication must be that normally used by the parent (such as sign language, braille, or oral communication).

(Authority: 20 U.S.C. 1480 (5), (6))

§ 303.404 Parent consent.

(a) Written parental consent must be obtained before—

(1) Conducting the initial evaluation and assessment of a child under § 303.322; and

(2) Initiating the provision of early intervention services for the first time (i.e., at the time that the initial IFSP is developed).

(b) If consent is not given, the public agency shall make reasonable efforts to ensure that the parent—

(1) Is fully aware of the nature of the evaluation and assessment or the services that would be available; and

(2) Understands that the child will not be able to receive the evaluation and assessment or services unless consent is given.

(Authority: 20 U.S.C. 1480)

Note 1: In addition to the consent requirements in this section, other consent requirements (regarding personally identifiable information) are included in the confidentiality requirements in the regulations under Part B of the Act (34 CFR 300.571), and in 34 CFR Part 99 (Privacy Rights of Parents and Students), both of which apply to this part.

Note 2: The Part B regulations contain procedures to enable public agencies to initiate a due process hearing or use other procedures to override a parent's refusal to consent to the initial evaluation of the parent's child. Those procedures apply to eligible children under this part, since the Part B evaluation requirement applies to all handicapped children in a State, including infants and toddlers.

§ 303.405 Surrogate parents.

(1) *General.* Each lead agency shall ensure that the rights of children eligible under this part are protected if—

(1) No parent (as defined in § 303.18) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of lead agency and other public agencies.* The duty of the lead agency, or other public agency under paragraph (a) of this section, includes the assignment of an individual to act as a surrogate for the parent. This must include a method for—

(1) Determining whether a child needs a surrogate parent; and

(2) Assigning a surrogate parent to the child.

(c) *Criteria for selecting surrogates.* (1) The lead agency or other public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall ensure that a person selected as a surrogate parent—

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills that ensure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate parent may not be an employee of any agency involved in the provision of early intervention or other services to the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (d)(1) of this section is not an employee solely because he or she is paid by a public agency to serve as a surrogate parent.

(e) *Responsibilities.* A surrogate parent may represent a child in all matters related to—

(1) The evaluation and assessment of the child;

(2) Development and implementation of the child's IFSPs, including annual evaluations and periodic reviews;

(3) The ongoing provision of early intervention services to the child; and

(4) Any other rights established under this part.

(Authority: 20 U.S.C. 1480(4))

Impartial Procedures for Resolving Individual Child Complaints

§ 303.420 Administrative resolution of individual child complaints by an impartial decision-maker.

Each system must include written procedures for the timely administrative resolution of individual child complaints by parents concerning any of the matters in § 303.403(a). A State may meet this requirement by—

(a) Adopting the due process procedures in 34 CFR 300.506 through 300.512; or

(b) Developing procedures that—

(1) Meet the requirements in §§ 303.421 through 303.425; and

(2) Provide parents a means of filing a complaint.

(Authority: 20 U.S.C. 1480(1))

Note 1: Sections 303.420 through 303.425 are concerned with the adoption of impartial procedures for resolving individual child complaints (i.e., complaints that generally affect only a single child or the child's family). These procedures require the appointment of an impartial decision-maker, who is not an employee of any agency involved in the provision of early intervention services, to resolve a dispute between the parent and the public agency. The agency is bound by the decision of the impartial decision-maker, and is required to implement the decision, unless it is reversed on appeal.

A different type of administrative procedure is included in §§ 303.510 through 303.512 of Subpart F. Under those procedures, the lead agency is responsible for (1) investigating any complaint that it receives (including individual child complaints, and those that are systemic in nature), and (2) resolving the complaint, if the agency determines that a violation has occurred.

Note 2: It is important that the administrative procedures developed by a State be designed to result in speedy resolution of complaints. An infant's or toddler's development is so rapid that undue delay could be potentially harmful.

In an effort to facilitate resolution, States may wish, with parental concurrence, to offer mediation as an intervening step prior to implementing the procedures in this section. Although mediation is not required under either Part B or Part H of the Act, some States have reported that mediations conducted under Part B have led to speedy resolution of differences between parents and agencies, without the development of an adversarial relationship and with minimal emotional stress to parents.

While a State may elect to adopt a mediation process, the State cannot require that parents use that process. Mediation may not be used to deny or delay a parent's rights under this part. The complaint must be resolved, and a written decision made, within the 30-day timeline in § 303.423.

§ 303.421 Appointment of an impartial person.

(a) *Qualifications and duties.* An impartial person must be appointed to implement the complaint resolution process in this subpart. The person must—

(1) Have knowledge about the provisions of this part, and the needs of, and services available for, eligible children and their families; and

(2) Perform the following duties:

(i) Listen to the presentation of relevant viewpoints about the complaint, examine all information relevant to the issues, and seek to reach a timely resolution of the complaint.

(ii) Provide a record of the proceedings, including a written decision.

(b) *Definition of impartial.* (1) As used in this section, "impartial" means that the person appointed to implement the complaint resolution process—

(i) Is not an employee of any agency or program involved in the provision of early intervention services or care of the child; and

(ii) Does not have a personal or professional interest that would conflict with his or her objectivity in implementing the process.

(2) A person who otherwise qualifies under paragraph (b)(1) of this section is not an employee of an agency solely because the person is paid by the agency to implement the complaint resolution process.

(Authority: 20 U.S.C. 1480(1))

§ 303.422 Parent rights in administrative proceedings.

(a) *General.* Each lead agency shall ensure that the parents of children eligible under this part are afforded the rights in paragraph (b) of this section in any administrative proceedings carried out under § 303.420.

(b) *Rights.* Any parent involved in an administrative proceeding has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early intervention services for children eligible under this part;

(2) Present evidence, and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the proceeding that has not been disclosed to the parent at least five days before the proceeding;

(4) Obtain a written or electronic verbatim transcription of the proceeding; and

(5) Obtain written findings of fact and decisions.

(Authority: 20 U.S.C. 1480)

§ 303.423 Convenience of proceedings; timelines.

(a) Any proceeding for implementing the complaint resolution process in this subpart must be carried out at a time and place that is reasonably convenient to the parents.

(b) Each lead agency shall ensure that not later than 30 days after the receipt of a parent's complaint, the impartial proceeding required under this subpart is completed and a written decision mailed to each of the parties.

(Authority: 20 U.S.C. 1480(1))

Note: Under Part B of the Act, States are allowed 45 days to conduct an impartial due process hearing (i.e., within 45 days after the receipt of a request for a hearing, a decision is reached and a copy of the decision is mailed to each of the parties). (See 34 CFR 300.512.) Thus, if a State, in meeting the requirements of § 303.420, elects to adopt the due process procedures under Part B, that State would also have 45 days for hearings. However, any State in that situation is encouraged (but not required) to accelerate the timeliness for the due process hearings for children who are eligible under this part—from 45 days to the 30-day timeline in this section. Because the needs of children in the birth through two age range change so rapidly, quick resolution of complaints is important.

§ 303.424 Civil action.

Any party aggrieved by the findings and decision regarding an administrative complaint has the right to bring a civil action in State or Federal court under section 680(1) of the Act.

(Authority: 20 U.S.C. 1480(1))

§ 303.425 Status of a child during proceedings.

(a) During the pendency of any proceeding involving a complaint under this subpart, unless the public agency and parents of a child otherwise agree, the child must continue to receive the appropriate early intervention services currently being provided.

(b) If the complaint involves an application for initial services under this part, the child must receive those services that are not in dispute.

(Authority: 20 U.S.C. 1480(7))

Confidentiality

§ 303.460 Confidentiality of information.

(a) Each State shall adopt or develop policies and procedures that the State will follow in order to ensure the protection of any personally identifiable information collected, used, or maintained under this part.

(b) These policies and procedures must meet the requirements in 34 CFR 300.560 through 300.576, with the following modifications:

(1) Any reference to the "State educational agency" means the lead agency under this part.

(2) Any reference to "education of handicapped children," "education of all handicapped children," or "provision of free public education to all handicapped children" means the provision of services to children eligible under this part and their families.

(3) Any reference to "local educational agencies" and

"intermediate educational units" means local service providers.

(4) Any reference to 34 CFR 300.128 means §§ 303.164 and 303.321.

(5) Any reference to 34 CFR 300.129 means this section (§ 303.460).

(Authority: 20 U.S.C. 1480(2), 1483)

Note: With the modifications in paragraphs (b)(1) through (b)(5) of this section, the confidentiality requirements in the regulations implementing Part B of the Act (34 CFR 300.560 through 300.576) are to be used by public agencies to meet the confidentiality requirements under Part H of the Act and this section (303.560).

The Part B provisions incorporate by reference the regulations in 34 CFR Part 99 (Privacy Rights of Parents and Students); therefore, those regulations also apply to this part.

Subpart F—State Administration

General

§ 303.500 Lead agency establishment or designation.

Each system must include a single line of responsibility in a lead agency that—

(a) Is established or designated by the Governor; and

(b) Is responsible for the administration of the system, in accordance with the requirements of this part.

(Authority: 20 U.S.C. 1476(b)(9))

§ 303.501 Supervision and monitoring of programs.

(a) *General.* Each lead agency is responsible for the general administration, supervision, and monitoring of programs and activities receiving assistance under this part, to ensure compliance with the provisions of this part.

(b) *Methods of administering programs.* In meeting the requirement in paragraph (a) of this section, the lead agency shall adopt and use proper methods of administering each program, including—

(1) Monitoring of agencies, institutions, and organizations receiving assistance under this part;

(2) Enforcement of any obligations imposed on those agencies under Part H of the Act and these regulations;

(3) Providing technical assistance, if necessary, to those agencies, institutions, and organizations; and

(4) Correction of deficiencies that are identified through monitoring.

(Authority: 20 U.S.C. 1476(b)(9)(A))

Lead Agency Procedures for Resolving Complaints

§ 303.510 Adopting complaint procedures.

Each lead agency shall adopt written procedures for—

(a) Receiving and resolving any complaint that one or more requirements of this part are not being met; and

(b) Conducting an independent on-site investigation of a complaint if the lead agency determines that an on-site investigation is necessary.

(Authority: 20 U.S.C. 1476(b)(9))

Note: Because of the interagency nature of Part H of the Act, complaints received under these regulations could concern violations by (1) any public agency in the State that receives funds under this part (e.g., the lead agency and the Council), (2) other public agencies that are involved in the State's early intervention program, or (3) private service providers that receive Part H funds on a contract basis from a public agency to carry out a given function or provide a given service required under this part. These complaint procedures are in addition to any other rights under State or Federal law. Complaints under these procedures are filed with the lead agency.

§ 303.511 An organization or individual may file a complaint.

An individual or organization may file a written signed complaint with the lead agency. The complaint must include—

(a) A statement that the State has violated a requirement of Part H of the Act or the regulations in this part; and

(b) The facts on which the complaint is based.

(Authority: 20 U.S.C. 1476(b)(9))

§ 303.512 Minimum complaint procedures.

Each lead agency shall include the following in its complaint procedures:

(a) A time limit of 60 days after the agency receives the complaint—

(1) To carry out an independent on-site investigation, if necessary; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the lead agency.

(Authority: 20 U.S.C. 1476(b)(9))

Policies and Procedures Related to Financial Matters

§ 303.520 Policies related to payment for services.

(a) *General.* Each lead agency is responsible for establishing State policies related to how services to children eligible under this part and their families will be paid for under the State's early intervention program. The policies must—

(1) Meet the requirements in paragraph (b) of this section; and

(2) Be reflected in the interagency agreements required in § 303.523.

(b) *Specific funding policies.* A State's policies must—

(1) Specify which functions and services will be provided at no cost to all parents;

(2) Specify which functions or services, if any, will be subject to a system of payments, and include—

(i) Information about the payment system and schedule of sliding fees that will be used; and

(ii) The basis and amount of payments; and

(3) Include an assurance that—

(i) Fees will not be charged for the services that a child is otherwise entitled to receive at no cost to parents; and

(ii) The inability of the parents of an eligible child to pay for services will not result in the denial of services to the child or the child's family.

(c) *Procedures to ensure the timely provision of services.* No later than the beginning of the fifth year of a State's participation under this part, the State shall implement a mechanism to ensure that no services that a child is entitled to receive are delayed or denied because of disputes between agencies regarding financial or other responsibilities.

(Authority: 20 U.S.C. 1476(b)(9))

§ 303.521 Fees.

(a) *General.* A State may establish, consistent with § 303.12(a)(3)(iv), a system of payments for early intervention services, including a schedule of sliding fees.

(b) *Functions not subject to fees.* The following are required functions that must be carried out at public expense by a State, and for which no fees may be charged to parents:

(1) Implementing the child find requirements in § 303.321;

(2) Evaluation and assessment, as included in § 303.322, and including the functions related to evaluation and assessment in § 303.12.

(3) Case management, as included in §§ 303.6 and 303.344(g).

(4) Administrative and coordinative activities related to—

(i) The development, review, and evaluation of IFSPs in §§ 303.340 through 303.346; and

(ii) Implementation of the procedural safeguards in Subpart E, and the other components of the statewide system of early intervention services in Subparts D and F.

(c) *States with mandates to serve children from birth.* If a State has in effect a State law requiring the provision of a free appropriate public education to children with handicaps from birth, the State may not charge parents for any services (e.g., physical or occupational therapy) required under that law that are provided to children eligible under this part and their families.

(Authority: 20 U.S.C. 1472(2))

§ 303.522 Identification and coordination of resources.

(a) Each lead agency is responsible for—

(1) The identification and coordination of all available resources for early intervention services within the State, including those from Federal, State, local, and private sources; and

(2) Updating the information on the funding sources in paragraph (a)(1) of this section, if a legislative or policy change is made under any of those sources.

(b) The Federal funding sources in paragraph (a)(1) of this section include—

(1) Title V of the Social Security Act (relating to Maternal and Child Health);

(2) Title XIX of the Social Security Act (relating to the general Medicaid Program, and EPSDT);

(3) The Head Start Act;

(4) Parts B and H of the EHA;

(5) Subpart 2 of Part D of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, as amended;

(6) The Developmentally Disabled Assistance and Bill of Rights Act (Pub. L. 94-103); and

(7) Other Federal programs.

(Authority: 20 U.S.C. 1476(b)(9)(B))

§ 303.523 Interagency agreements.

(a) *General.* Each lead agency is responsible for entering into formal interagency agreements with other State-level agencies involved in the State's early intervention program. Each agreement must meet the requirements in paragraphs (b) through (d) of this section.

(b) *Financial responsibility.* Each agreement must define the financial responsibility of the agency for paying for early intervention services (consistent with State law and the requirements of this part).

(c) *Procedures for resolving disputes.* (1) Each agreement must include procedures for achieving a timely resolution of intra- and interagency disputes about payments for a given service, or disputes about other matters related to the State's early intervention program. Those procedures must include a mechanism for making a final determination that is binding upon the agencies involved.

(2) The agreement with each agency must—

(i) Permit the agency to resolve its own internal disputes (based on the agency's procedures that are included in the agreement), so long as the agency acts in a timely manner; and

(ii) Include the process that the lead agency will follow in achieving resolution of intra-agency disputes, if a given agency is unable to resolve its own internal disputes in a timely manner.

(d) *Additional components.* Each agreement must include any additional components necessary to ensure effective cooperation and coordination among all agencies involved in the State's early intervention program.

(Authority: 20 U.S.C. 1476(b)(9)(F))

Note: A State may meet the requirement in paragraph (c)(1) of this section in any way permitted under State law, including (1) providing for a third party (e.g., an administrative law judge) to review a dispute and render a decision, (2) assignment of the responsibility by the Governor to the lead agency or Council, or (3) having the final decision made directly by the Governor.

§ 303.524 Resolution of disputes.

(a) Each lead agency is responsible for resolving individual disputes, in accordance with the procedures in § 303.523(c)(2)(ii).

(b) (1) During the pendency of a dispute, the lead agency shall—

(i) Assign financial responsibility to an agency, subject to the provisions in paragraph (b)(2) of this section; or

(ii) Pay for the service, in accordance with the "payor of last resort" provisions in § 303.527.

(2) If, in resolving the dispute, the lead agency determines that the assignment of financial responsibility under paragraph (b)(1)(i) of this section was inappropriately made, the lead agency shall—

(i) Reassign the responsibility to the appropriate agency; and

(ii) Make arrangements for reimbursement of any expenditures incurred by the agency originally assigned responsibility.

(c) To the extent necessary to ensure compliance with its action in paragraph (b)(2) of this section, the lead agency shall—

(1) Refer the dispute to the Council or the Governor; and

(2) Implement the procedures in § 303.525.

(Authority: 20 U.S.C. 1476(b)(9)(E))

§ 303.525 Delivery of services in a timely manner.

Each lead agency is responsible for the development of procedures to ensure that services are provided to eligible children and their families in a timely manner, pending the resolution of disputes among public agencies or service providers.

(Authority: 20 U.S.C. 1476(b)(9)(D))

§ 303.526 Policy for contracting or otherwise arranging for services.

Each system must include a policy pertaining to contracting or making other arrangements with public or private service providers to provide early intervention services. The policy must include—

(a) A requirement that all early intervention services must meet State standards and be consistent with the provisions of this part;

(b) The mechanisms that the lead agency will use in arranging for these services, including the process by which awards or other arrangements are made; and

(c) The basic requirements that must be met by any individual or organization seeking to provide these services for the lead agency.

(Authority: 20 U.S.C. 1476(b)(10))

Note: In implementing the statewide system, States may elect to continue using agencies and individuals in both the public and private sectors that have previously been involved in providing early intervention services, so long as those agencies and individuals meet the requirements of this part.

§ 303.527 Payor of last resort.

(a) *Nonsubstitution of funds.* Except as provided in paragraph (b)(1) of this section, funds under this part may not be used to satisfy a financial commitment for services that would otherwise have been paid for from another public or private source but for the enactment of Part H of the Act. Therefore, funds under this part may be used only for early intervention services that an eligible child needs but is not currently entitled to under any other Federal, State, local, or private source.

(b) *Interim payments; reimbursement.* (1) If necessary to prevent a delay in the timely provision of services to an eligible child or the child's family, funds under this part may be used to pay the provider of services, pending reimbursement from the agency or entity that has ultimate responsibility for the payment.

(2) Payments under paragraph (b)(1) of this section may be made for—

(i) Early intervention services, as described in § 303.12;

(ii) Eligible health services (see § 303.13); and

(iii) Other functions and services authorized under this part, including child find, and evaluation and assessment.

(3) The provisions of paragraph (b)(1) of this section do not apply to medical

services or "well-baby" health care (see § 303.13(c)(1)).

(c) *Non-reduction of benefits.* Nothing in this part may be construed to permit a State to reduce medical or other assistance available or to alter eligibility under Title V of the Social Security Act (SSA) (relating to maternal and child health) or Title XIX of the SSA (relating to Medicaid for children eligible under this part) within the State.

(Authority: 20 U.S.C. 1481)

Note: The Congress intended that the enactment of Part H not be construed as a license to any agency (including the lead agency and other agencies in the State) to withdraw funding for services that currently are or would be made available to eligible children but for the existence of the program under this part. Thus, the Congress intended that other funding sources would continue, and that there would be greater coordination among agencies regarding the payment of costs.

The Congress further clarified its intent concerning payments under Medicaid by including in section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360) an amendment to Title XIX of the Social Security Act. That amendment states, in effect, that nothing in this title shall be construed as prohibiting or restricting, or authorizing the Secretary of Health and Human Services to prohibit or restrict, payment under subsection (a) for medical assistance for covered services furnished to a handicapped infant or toddler because such services are included in the child's IFSP adopted pursuant to Part H of the EHA.

§ 303.528 Reimbursement procedure.

Each system must include a procedure for securing the timely reimbursement of funds used under this part, in accordance with § 303.527(b).

(Authority: 20 U.S.C. 1476(b)(11)

Reporting Requirements

§ 303.540 Data collection.

(a) Each system must include the procedures that the State uses to compile data on the statewide system. The procedures must—

(1) Include a process for—

(i) Collecting data from various agencies and service providers in the State;

(ii) Making use of appropriate sampling methods, if sampling is permitted; and

(iii) Describing the sampling methods used, if reporting to the Secretary; and

(2) Provide for reporting the data required under section 676(b)(14) of the Act, and other information that the Secretary may require, including information required under section 618 of the Act.

(b) The information required in paragraph (a)(2) of this section must be provided at the time and in the manner specified by the Secretary.

(Authority: 20 U.S.C. 1476(b)(14))

Use of Funds for State Administration

§ 303.560 Use of funds by the lead agency.

A lead agency may use funds under this part that are reasonable and necessary for administering the State's early intervention program for infants and toddlers with handicaps.

(Authority: 20 U.S.C. 1473; 1476(b)(9))

Subpart G—State Interagency Coordinating Council

General

§ 303.600 Establishment of Council.

(a) A State that desires to receive financial assistance under this part shall establish a State Interagency Coordinating Council composed of 15 members.

(b) The Council and the chairperson of the Council must be appointed by the Governor. The Governor shall ensure that the membership of the Council reasonably represents the population of the State.

(Authority: 20 U.S.C. 1482(a))

Note. The number of members on the Council was established by statute. However, to the extent that a State determines that full and effective representation requires more than 15 members, it would be appropriate for the Council to request the Governor to appoint additional members of an ex officio basis, or, with the permission of the Governor, for the Council chairperson to take that action.

In addition to appointing ex officio members to the Council, consideration might be given to establishing (1) regional committees, or (2) special committees to address key issues related to the effective implementation of this part.

To the extent that additional members are added—either on an ex officio basis or through the establishment of regional or special committees—the Council may wish to ensure that the general proportion of parents on the Council (as specified in § 303.601(a)) is maintained. However, to avoid a potential conflict of interest, it is recommended that parent representatives who are selected to serve on the Council not be employees of any agency involved in providing early intervention services.

In any deliberations by the Council for increasing the number of people who have a role in Council activities, it is suggested that consideration be given to maintaining an appropriate balance between the urban and rural communities of the State.

§ 300.601 Composition.

The Council must be composed of the following:

(a) At least—

(1) Three members who are parents of infants and toddlers with handicaps or of handicapped children aged three through six;

(2) Three public or private providers of early intervention services;

(3) One representative from the State legislature; and

(4) One person in personnel preparation.

(b) Other members representing each of the appropriate agencies involved in the provision of or payment for early intervention services to eligible children and their families, and others selected by the Governor.

(Authority: 20 U.S.C. 1482(b))

Note: In order to enhance the effectiveness of the Council in carrying out its functions under this part, it is recommended that efforts be made to include representatives of each State agency or other major service provider that has a role in the State's early intervention program, such as the state health and education departments, health care providers, and other key providers. It is important for State agency representatives to have the authority to effectively represent their agencies.

A representative of the SEA who is responsible for, or knowledgeable about, the Preschool Grants Program under Section 619 of the Act (34 CFR Part 301) would be an appropriate person to be appointed as a regular member of the Council. Inclusion of such a person will help to ensure the smooth transition of children under this part who will require special education and related services under this program.

It is recommended that the person selected to represent the field of personnel preparation have expertise in early intervention programs for children eligible under this part and their families.

§ 303.602 Use of funds by the Council.

(a) *General.* Subject to the approval by the Governor, the Council may use funds under this part to hire staff and obtain the services of professional, technical, and clerical personnel, as may be necessary to carry out the performance of its functions under this part.

(b) *Compensation and expenses of Council members.* (1) Except as provided in paragraph (b)(2) of this section, Council members shall serve without compensation from funds available under this part, but the Council shall reimburse its members for reasonable and necessary expenses for attending meetings and performing Council duties. Funds provided under this part may be used for this purpose.

(2) Funds under this part may be used to pay compensation if—

(i) A Council member is not employed; or

(ii) A Council member must forfeit wages from other employment when participating in official Council functions.

(Authority: 20 U.S.C. 1479; 1482(c), (d))

§ 303.603 Meetings.

(a) The Council shall meet at least quarterly and in such places as it deems necessary.

(b) The meetings must—

(1) Be publicly announced sufficiently in advance of the dates thay are to be held to ensure that all interested parties have an opportunity to attend; and

(2) To the extent appropriate, be open and accessible to the general public.

(c) Interpreters for persons who are deaf and other necessary services must be provided at Council meetings, both for Council members and participants. The Council may use funds under this part to pay for those services.

(Authority: 20 U.S.C. 1482(c), (d))

§ 303.604 Conflict of interest.

No member of the Council may cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest.

(Authority: 20 U.S.C. 1842(f))

Functions of the Council

§ 303.650 General.

Each Council shall—

(a) Advise and assist the lead agency in the development and implementation of the policies that constitute the statewide system;

(b) Assist the lead agency in achieving the full participation, coordination, and cooperation of all appropriate public agencies in the State;

(c) Assist the lead agency in the effective implementation of the statewide system, by establishing a process that includes—

(1) Seeking information from service providers, case managers, parents, and others about any Federal, State, or local policies that impede timely service delivery; and

(2) Taking steps to ensure that any policy problems identified under paragraph (c)(1) of this section are resolved; and

(d) To the extent appropriate, assist the lead agency in the resolution of disputes.

(Authority: 20 U.S.C. 1482(e))

§ 303.651 Advising and assisting the lead agency in its administrative duties.

Each Council shall advise and assist the lead agency in the—

(a) Identification of sources of fiscal and other support for services for early intervention programs under this part;

(b) Assignment of financial responsibility to the appropriate agency; and

(c) Promotion of the interagency agreements under § 303.523.

(Authority: 20 U.S.C. 1482(e)(1))

§ 303.652 Applications.

Each Council shall advise and assist the lead agency in the preparation of applications under this part, and amendments to those applications.

(Authority: 20 U.S.C. 1482(e)(2))

§ 303.653 Annual report to the Secretary.

(a) Each Council shall—

(1) Prepare an annual report to the Governor and to the Secretary on the status of early intervention programs operated within the State for children eligible under this part and their families; and

(2) Submit the report to the Secretary by a date that the Secretary establishes.

(b) Each annual report must contain the information required by the Secretary for the year for which the report is made.

(Authority: 20 U.S.C. 1482(e)(3))

Existing Councils

§ 303.670 Use of existing councils.

If a State established a Council before September 1, 1986, that is comparable to the requirements for a Council in this subpart (e.g., in terms of its composition, meetings, and functions), that Council is considered to be in compliance with these requirements. However, within four years after the date that a State accepts funds under this part, the State shall establish a Council that complies in full with the requirements of this subpart.

(Authority: 20 U.S.C. 1482(g))

Note: This Appendix will not appear in the Code of Federal Regulations.

Appendix A—Analysis of Comments and Changes

The following is an analysis of the comments received on the Notice of Proposed Rulemaking (NPRM), and the changes made in the regulations since publication of the NPRM. Substantive issues, including comments on the preamble that applied to the text of the regulations, are included under the subpart, subheading, and section to which they pertain in these final regulations. Therefore, unless otherwise indicated, all section numbers used in the Appendix refer to sections in the final regulations. Technical and other minor changes are not addressed.

To assist readers in finding where each section in the NPRM is located in the final regulation, a redesignation table has been included in Appendix B.

Subpart A—General

Purpose of the early intervention program for infants and toddlers with handicaps (§ 303.1)

Comment: There was a general theme throughout the comments that the regulations should express the broader purposes of the Act (e.g., those related to improving the total functioning of eligible children, and enhancing the abilities of parents and other family members to meet the developmental needs of their children).

Discussion: The Secretary believes that these final regulations provide the background and context for the implementation of this program, and reflect the broader purposes of the Act, especially in terms of supporting the role of parents and other family members in enhancing the development of infants and toddlers with handicaps.

Change: No change has been made in § 303.1. However, throughout these final regulations, greater emphasis has been given to (1) the importance of families of eligible children in enhancing the development of their children (see, for example, §§ 303.22(2), 303.340(b), and 303.344(b)), and (2) parents as decision-makers in determining the extent to which they, their eligible children, and other family members accept or decline services under this part (see, for example, §§ 303.345, 303.404, and 303.422).

Eligible applicants for an award (§ 303.2)

Comment: Some commenters recommended that the Department of Defense Schools (DODS) be listed specifically as an eligible applicant in this section to ensure that children whose families are in the military receive early intervention services.

Discussion: The list of eligible applicants for an award is taken from the Act, and includes the 50 States, Puerto Rico, the District of Columbia, and eligible territories. There is no statutory basis for adding other applicants for an award. Eligible children whose families are in the military will be able to receive services based upon where they are domiciled.

Change: No change has been made with respect to children of military families. However, a sentence has been added to § 303.2 to clarify that the future eligibility of the Republic of Palau will be governed by the terms of the Compact of Free Association.

Activities that may be supported under this part (§ 303.3)

Comment. A few commenters requested that this section be amended to permit funds under this part to be used in coordination with funds under the Preschool Grants program, 34 CFR Part 301, for the planning and development of a statewide comprehensive delivery system for children from birth through age five.

Discussion: Although funds under this part must be used only for activities related to infants and toddlers with handicaps, a broader provision is contained under the Preschool Grants program. Under that authority, States may use up to 20% of their annual grant funds (1) for planning and developing a comprehensive delivery system of services for children from birth through five, and (2) for providing direct and support services to children with handicaps, aged three through five (see 34 CFR 301.30).

Funds under this part may be used in coordination with the Preschool Grant funds for planning and implementation activities for children from birth through age five, so long as (1) there is a clear audit trail on each funding source, and (2) the funds under this part are used only for activities for children birth through age two.

Change: None.

Comment: Commenters requested that a definition of "direct services" be added. Commenters also asked for guidance about what would constitute allowable administrative costs for activities to plan, develop, and implement the statewide system.

Discussion: Information about allowable administrative costs is included in the EDGAR regulations, 34 CFR Part 80. With respect to "direct services," the Secretary feels that a definition in the regulations is not necessary. Direct services are those that would be provided directly to a child (e.g., physical therapy or occupational therapy), or to the family (e.g., counseling or transportation).

Change: None.

Comment: A commenter stated that the use of the term "private sources" in the Act should not be construed to require private nonprofit organizations to maintain their fiscal effort or to prevent States from using funds under this part if those funds are withdrawn. The commenter further stated that the inclusion of "private sources" was intended as an expression of insurers continue to pay for early intervention services.

Discussion: The Secretary agrees, that, although private organizations are encouraged to continue to provide early intervention services to eligible children and their families, they cannot be required to do so. States are not prohibited from using funds under this part to pay for services to children and families that were previously funded by private organizations, if the private funds are withdrawn.

Change: None.

Applicable regulations (§ 303.4)

Comment: May commenters requested that the applicable provisions from other regulations (i.e., the Education Department General Administrative Regulations (EDGAR), and those implementing Part B of the EHA) be incorporated in this part, rather than making reference to those provisions, as was done in the NPRM. Some of the commenters stated that having a self-contained set of regulations would facilitate administration of the program. A few commenters pointed out that simply referencing the other regulations places an undue burden on parents, because they are forced to search out the other documents. Other commenters recommended that certain of the Part B definitions that were referenced in § 303.16 of the NPRM (e.g., "public agency," "qualified," and certain related services definitions) be modified to reflect the special needs of infants and toddlers.

Discussion: The Secretary agrees with commenters that, to the extent possible, these regulations should contain all relevant information within one document. The Secretary has determined that complaint procedures, like those in EDGAR, should be added in this part, because the Department has proposed to delete those procedures from Part 76. However, it is not feasible to include all applicable provisions of EDGAR.

The Secretary believes that the EDGAR definition of "State" that was referenced in §303.15 of the NPRM should be deleted, and that the definition of "State" in section 602(a)(6) of the Act should be added to these regulations, because that definition includes the specific States and jurisdictions covered under this part for program operation purposes. Thus, each "State" included in the definition must meet all substantive requirements under this part. A special definition of "State" is included in §303.200(b)(2) for the purpose of making grants under this

Although it is not feasible to include all of the applicable provisions of Part B, the Secretary has determined that a number of provisions should be added, particularly all definitions that were incorporated by reference in §303.16 of the NPRM, and certain procedural requirements. To the extent appropriate, modifications have been made in those provisions to reflect the special requirements of infants and toddlers with handicaps and their families.

Change: The following changes have been made: (1) Minimum State complaint procedures, similar to those in EDGAR, have been added at §§303.510 through 303.512; (2) The EDGAR definition of "State", as referenced in §303.15 of the NPRM, has been deleted; (3) The definition of "State" from Section 602(a)(6) of the Act has been added at §303.22 with appropriate modifications; and (4) A number of provisions from the Part B regulations have been added to this part, including (a) certain procedural safeguards that have either been adopted with modifications or adapted (see discussion on §303.400 in this Appendix), (b) definitions that have been adopted verbatim (i.e., "include; including" (§303.15), and "parent" (§303.18)), and (c) definitions that have been adapted (i.e., "public agency" (§303.20), and "qualified" (§303.21)).

Definitions of related services that were referenced in §303.16 of the NPRM have also been adapted and included under this part (see discussion on §303.12 in this Appendix).

Definitions

Case management (§303.6)

Comment: Many commenters recommended that the term "enable" be used in the definition of case management to emphasize the need to strengthen the ability of families to carry out discussion and functions related to case management.

Discussion: The Secretary agrees that "enable" connotes an active role for families and should be included in the regulations.

Change: The definition of case management has been amended to include "enable."

Comment: A number of commenters requested that the specific case management activities described in the legislative history of Pub. L. 99-457 be added to the case manager's duties and responsibilities in §303.6. These included: (1) assuring the timely delivery of services, (2) informing parents of the availability of advocacy services, and active, ongoing process of continuously seeking the appropriate services or situations to benefit the development of each infant or toddler being served for the duration of the child's eligibility.

Discussion: The Secretary agrees that the specific case management activities included in the legislative history of the Act should be added to the definition in § 303.6, in order to reflect more accurately the duties and responsibilities of case managers under this part.

Change: Section 303.6 has been amended to include the requested activities.

Comment: Many commenters requested that the final regulations include additional clarification regarding the role of parents in terms of case management activities.

Discussion: The Secretary agrees that more clarification is needed. Under this part, case managers, as public agency employees, serve as "system advocates" for families, and function in a facilitating role, as needed (e.g., to assist parents in obtaining services for their child and other family members). However, case management is not a static function, nor is it expected to be the same at every stage of a child's development or for every family. The kinds of assistance that a family needs during the neonatal stage of a child's development may be different than their needs later in the child's life; and some parents may want, and be able, to play a more active role than others. Effective case management must be responsive to individual differences and family needs.

Case management will be most effective if case managers and parents are able to work cooperatively together. For this reason, States should take all responsible efforts to ensure that a well-functioning collaborative working relationship is created.

Change: None.

Comment: Some commenters requested that the regulations provide that parents be appointed as case managers for their children.

Discussion: The Secretary believes that the Congress included the requirements for case managers and case management in order to ensure that, because of the interagency, multidisciplinary nature of Part H, the burden of seeking out and obtaining services guaranteed under this program would be placed upon appropriate public agencies in the State and not on the parents of eligible infants and toddlers. Thus, the statute requires that each IFSP must include "the name of the case manager from the profession most immediately relevant to the infants and toddlers or family's needs who will be responsible for the implementation of the plan and coordination with other agencies and persons."

The Secretary believes that the statutory requirements evidence a clear congressional intent that the responsibility for "case management," as that term is defined in § 303.6, be assigned to an appropriate, qualified public agency employee. It is also clear that the Congress did not intend for parents to have to assume this responsibility.

Although parents may not be named as case managers, the Secretary recognizes that parents (1) must be actively involved in making sure that their eligible children and other family members receive all of the services and protections that they are entitled to under this part, and (2) are major decision-makers in deciding the extent to which they will participate in, and receive services under, this program.

Change: None.

Comment: Several commenters asked for regulations or clarifying notes that provide for case managers to (1) coordinate services across agencies, and (2) have the authority to ensure services. Some commenters requested that language be added specifying that it is not necessary to develop a new case management system if a system is already in place.

Discussion: The Secretary believes that it is the lead agency's responsibility, with the assistance of the Council, to ensure that (1) services are coordinated across agencies, and (2) case managers are able to carry out case management on an interagency basis, as needed. The Secretary agrees that case managers, because of their facilitating role, must be able to coordinate services for a child across agencies, in order to ensure the timely delivery of those services. He also agrees that new case management systems do not need to be developed, if a system that meets the requirements of this part is already in place.

Change: A provision has been added at § 303.6(c)(2) to require that States design their policies and procedures to enable case managers to effectively carry out case management functions on an interagency basis.

Comment: A number of commenters requested that provisions be added to ensure that case managers have the necessary qualifications to carry out effectively their responsibilities under this part.

Discussion: The Secretary agrees that, because of the crucial role that case managers play under this program, the qualifications for case managers should be added to the regulations. The Secretary believes that, to perform effectively the tasks required of them, case managers should have demonstrated knowledge and understanding about (1) the children who are eligible under this part, (2) the provisions of this part, and (3) the State's early intervention service delivery system.

Change: Section 303.6 has been amended to include the qualifications of case managers.

Comment: Several commenters recommended that additional duties be added to case management, including (1) offering guidance to families regarding financial planning and payment, and (2) continuing case management throughout and beyond the transition period when a child moves to services under Part B.

Discussion: In carrying out case management responsibilities under this part, it is expected that case managers would provide guidance to families, as needed, regarding financial planning and payment to enable a child to receive early intervention services. Thus, an additional requirement is not necessary in the regulations. Case managers are responsible for assisting families in planning services for the transition to services under Part B. Part H does not authorize the continuation of case management beyond the transition period when a child moves to services under Part B. (See comments and discussion on § 303.344 in this Appendix.)

Change: None.

Children (§ 303.7)

Comment: Some commenters expressed concern that the term "infants and toddlers with handicaps," as used throughout the NPRM and in the definition of "children," could unnecessarily stigmatize children, especially "at risk" children who might be eligible for services, but are not handicapped.

Discussion: The Secretary believes that the commenters' concerns are valid, because of the potential for children to be stigmatized.

Change: Beginning with § 303.1, and throughout the final regulations, the term "children eligible under this part" has generally replaced the term "infants and toddlers with handicaps." A note has been added to § 303.16 to address the concern raised by the commenters.

Council (§ 303.8)

Comment: One commenter recommended that the name of the State Interagency Coordinating Council be changed to Coordinating Council on Early Intervention Services.

Discussion: The name of the Council is statutory; there is no basis for a change.

Change: None.

Early intervention program (§ 303.11)

Comment: A number of commenters recommended that the regulations acknowledge that a comprehensive system of early intervention services should encompass all appropriate services needed by an eligible child and the child's family, not just those under Part H of the Act.

Discussion: The Secretary believes that the Congress intended that the early intervention program established under this part should encompass activities that extend beyond the provision of discrete early intervention services. He believes that the program should include the total effort in a State that is directed toward meeting the needs of children eligible under this part and their families, including (1) those functions that must be carried out as part of a State's responsibilities under this part (e.g., evaluation and assessment activities, case management, and administrative-coordinative activities related to the development, review, and evaluation of IFSPs, and implementation of the procedural safeguards); (2) specific early intervention services, as defined in § 303.12; and (3) medical and other services that an eligible child and the child's family may need, but which are not required under this part.

Change: A definition of "early intervention program" has been added at § 303.11.

Early intervention services (§ 303.12)

Comment: Several commenters asked for clarification about the sliding fees provision in the definition of early intervention services. Clarification was specifically requested regarding whether some services, such as identification, assessment, and screening, are excluded from the system of payments. Some commenters stated that early intervention services that are presently provided at no cost to parents in States with mandates should continue to be provided at no cost to parents. Another commenter requested that a minimum level of services be established for all eligible children that would be provided at no cost to parents.

Discussion: Since any system of payments, including a schedule of sliding fees, will in part depend on the laws of individual States, the Secretary intends to leave decisions regarding the establishment of applicable criteria to the States. The Secretary believes, however, that there are certain activities and functions (e.g., case management) that are not subject to a system of payments, and must be provided at no cost to parents. Also, to the extent that early identification, screening, and assessment services are required under the identification, location, and evaluation provision of Part B of the Act, those services must be provided at no cost.

In States with mandates to provide free appropriate public education (FAPE) to children from birth, those services included under part B that are applicable to children under Part H (e.g., physical and occupational therapy) must also be provided at no cost under this part.

Change: Section 303.521 has been added to delineate requirements related to the charging of fees.

Comment: Commenters requested that the definition of "early intervention services" be amended to state that early intervention services are designed to meet the needs of the family related to enhancing the child's development and are chosen in collaboration with parents.

Discussion: The Secretary agrees that, because of the nature of the program, the definition of early intervention services should be revised as recommended by the commenters.

Change: A change has been made at § 303.12(a) (1) and (2).

Comment: Many commenters stated that definitions of certain related services in the Part B regulations are not directly applicable to infants and toddlers with handicaps, and recommended that separate definitions of early intervention services be developed for this part. Commenters requested that the lists of early intervention services and personnel be expanded. Some commenters noted that "nutrition" was omitted as an early intervention service in the NPRM, even though the statute included nutritionists in the list of qualified personnel, and they recommended that it be included in the final regulations. Many commenters requested that services relating to identifying and serving children with vision and hearing disorders be added to the regulations. Other commenters requested an expanded list of types of services, such as transportation, transition, and home and family support services.

Discussion: The Secretary agrees that the definitions of related services in the Part B regulations are not directly applicable to this part, and that specific definitions of early intervention services should be added. He believes that these definitions should be based on current definitions used by practitioners. The Secretary also believes that the regulations should specify the general role and responsibilities of service providers that apply to each area of early intervention services (i.e., (1) consulting with parents, other service providers, and representatives of appropriate community agencies to ensure the effective provision of services in that area, (2) training parents and others regarding the provision of those services, and (3) participating in the multidisciplinary team's assessment of a child and the child's family, and in the development of integrated goals and outcomes for the IFSP).

The Secretary believes that nutrition should be added to the list of early intervention services, because of its importance to infants and toddlers with handicaps, and because nutritionists are included in the statute's list of qualified personnel. In addition, he believes that, because of the particular importance of transportation and its impact on access to other services, transportation should be included in the list of early intervention services. The Secretary agrees with commenters that other types of services and personnel are also important, but does not believe that it is necessary to add all potential services and personnel to the list. The lists of early intervention services and personnel are not exhaustive and may include other services and personnel (e.g., vision and hearing services). This is made clear in a note following the sections in both the NPRM and these final regulations.

Change: The following changes have been made: (1) Section 303.16 of the NPRM, which incorporated by reference applicable definitions from the Part B regulations, has been deleted; (2) a paragraph has been added at § 303.12(c) describing the general role of service providers; (3) a definition of each early intervention service in Section 672(2) of the Act has been added at § 303.12(d); (4) nutrition and transportation have also been added; (5) a definition of transportation has been added at § 303.23 and (6) a note has been added following § 303.12 to include examples of other early intervention services and personnel.

Comment: Some commenters were concerned that the Part B definition of "qualified" that was incorporated by reference in the NPRM was not appropriate, because of the reference to special education and State educational agency standards.

Discussion: The Secretary agrees that the Part B definition of "qualified" is not entirely appropriate for this part, and that it should be revised to specifically address the provision of early intervention services.

Change: The reference to the Part B definition of "qualified" has been deleted. A definition of "qualified" that is appropriate to this part has been added at § 303.21.

Comment: Many commenters (1) Expressed concern that the NPRM did not include a provision related to "least restrictive environment" (LRE) and to the providing of services in integrated settings with children who are not handicapped, and (2) requested that a statement concerning the provision of services in community-based settings be added under the definition of early intervention services.

Discussion: The Secretary agrees with the commenters that the final regulations should address the concept of providing services to infants and toddlers and their families in settings that do not isolate the child or family members from activities or settings in which children without handicaps and their families participate.

Change: Section 303.12(b), which requires services to be provided in an integrated setting, to the extent appropriate, has been added. A note regarding this provision has been added following the section.

Comment: Several commenters recommended that the definition of special instruction in § 303.14 of the NPRM be revised to describe more effectively the services to be provided. A few commenters questioned the appropriateness of "instruction" with infants. One commenter suggested deleting the entire section, because the commenter considered it to be redundant, confusing, and unnecessary. Several commenters recommended that the definition make clear that the community and the home are the preferred settings for special instruction.

Discussion: The Secretary believes that a separate section to define special instruction is not necessary. Since special instruction is one of the early intervention services included in the Act, it should be defined in the section on "Early intervention services." Section 303.12(b) of the final regulations contains provisions on the location of all early intervention services.

Change: The definition of special instruction has been revised and included with the other definitions of early intervention services (see § 303.12(d)(12)).

Health services (§ 303.13)

Comment: A number of commenters requested further guidance regarding what types of services are included as "health services." Commenters recommended specific items and services to be added, such as (1) Presently allowable services under Part B (e.g., clean intermittent catheterization); (2) health management services that accompany surgical or purely medical procedures, including consultations with medical personnel; (3) prescribed devices necessary for the control or treatment of a medical condition such as ventilators and gavage equipment; and (4) services that occur during the actual time a child participates in a center-based early intervention program.

Discussion: The Secretary agrees that needed health services should be made available during the time other early intervention services are provided, so that a child can benefit from the other early intervention services. Examples of necessary health services include tracheostomy care, tube feeding, and the changing of dressings or osteotomy bags. In addition, consultation by medical providers with other early intervention personnel may be necessary, so that a child can benefit from the provision of early intervention services. However, the Secretary does not believe that the costs of medical-health services, such as immunizations and regular "well-baby" care, are allowable under this part, because they are services that are routinely recommended for all children. Though not covered under this part, these medical-health services are essential for all infants and toddlers. The Secretary believes that, to the extent appropriate, these services should be included in the IFSP, along with the funding sources to be used in paying for the services. However, the Secretary does not believe that the provision of a device necessary for the control or treatment of a medical condition can be included as health services, since the statute limits coverage of medical services to those necessary for diagnostic and evaluation purposes only.

Change: Section 303.13 has been expanded to include the following: (1) Language clarifying that "health services" means those services necessary to enable a child to benefit from the other early intervention services the child is receiving under this part during the time that the child is receiving the other services; (2) examples of health services that a State is required to provide; (3) a paragraph regarding allowable consultation services; and (4) examples of medical-health services that are not required. The note following § 303.13 has been revised to clarify that, to the extent appropriate, medical-health services are to be included in the IFSP, along with the funding sources to be used in paying for those services. (See comment on medical-health services on § 303.344 in this Appendix.)

Infants and toddlers with handicaps (§ 303.16)

Comment: Many commenters asked that vision and hearing be included as areas of development in the definition of "infants and toddlers with handicaps". Several other commenters recommended expanding the definition of "physical development" to include other components (e.g., neurological development).

Discussion: The Secretary agrees that vision and hearing should be added to the definition of infants and toddlers with handicaps to highlight the importance of sensory impairments in the development of the child. However, he does not believe that further expansion of this definition is necessary, since neurological development is commonly understood to be a component of physical development.

Change: Vision and hearing have been added to the area of "physical development" in § 303.16 and to other appropriate sections in this part.

Comment: One commenter stated that the term "appropriate diagnostic instruments and procedures" was too vague, and recommended that "standardized instruments" be used instead. Other commenters recommended that informal assessments and professional clinical judgment, including the observations of multidisciplinary assessment teams, should be required, because appropriate standardized instruments do not exist at this time that accurately measure developmental delay in infants and toddlers with handicaps.

Discussion: The Secretary believes that the concerns raised by commenters about the methods used to determine developmental delay in infancy should be addressed. Since standardized diagnostic instruments are generally unavailable for use with infants and toddlers with handicaps, the Secretary believes that the evaluation of children under this part must be based on informed clinical opinion.

Change: No change has been made in § 303.16. However, § 303.300 has been revised to require States to include the procedures that will be used to identify developmental delay in the State definition of "developmental delay." A note has been added following § 303.300 that addresses the use of standardized procedures with infants. A provision requiring evaluations and assessments to be based on informed clinical opinion has been added at § 303.322(c)(2).

Comment: Several commenters stated that the term "high probability" should not be viewed as a statistical concept and that the term should be more precisely defined. One commenter suggested that conditions resulting in developmental problems, rather than delays, was a more appropriate definition for this population. Some commenters suggested adding examples of conditions that could be included in this category.

Discussion: The Secretary agrees that the term "high probability" should not be viewed as a statistical concept. The presence of a diagnosed condition is the key concept in the phrase "have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay."

Change: Language has been added to the note following § 303.16 to clarify what is meant by the term "high probability."

Comment: A number of comments were received regarding the criteria for "at risk" in the definition of infants and toddlers with handicaps. Several commenters suggested that the "at risk" condition not be viewed as an indicator of developmental delay. Commenters also recommended adding examples of possible "at risk" criteria. Other commenters felt that an "at risk" determination should not be made based upon factors such as socio-economic status, sex, creed, religion, and racial or ethnic background.

Discussion: The criteria for identifying "at risk" children must be developed at the State level, since the serving of these children is at State discretion. However, the Secretary believes that it would be appropriate to provide some guidance about the kinds of conditions that States may want to consider in identifying children at risk for developmental delay.

Change: A note has been added following § 303.16 that describes examples of "at risk" factors that States could consider if they choose to serve infants or toddlers at risk for developmental delay.

Subpart B—State Application for a Grant

Public participation (§§ 303.110 through 303.113)

Comment: A number of commenters stated that a provision in section 678(a)(4)(B) of the Act requiring a summary of public comments and the State's responses had been omitted from the NPRM and should be added to the final regulations. Some commenters wanted the public participation requirements in §§ 303.21 and 303.36 of the NPRM to be grouped together in the final regulations. Some commenters requested more guidance about the public participation requirements. The commenters asked that the regulations specify the length of the comment period and the procedures for providing comments, so as to ensure a fair opportunity for public review and comment. Some commenters felt that, under the notice of hearing requirements in § 303.21(b) of the NPRM, the term "sufficiently in advance of the hearing" is too vague, and that the States need definitive timelines in order for the requirements to be effectively implemented. Several commenters recommended a 30-day timeline.

Discussion: The provision on public comments and State responses was included under § 303.36 in the NPRM. However, based on the comments received, the Secretary believes that this provision, and all other substantive requirements on public participation, should be grouped together in the final regulations. He also agrees that further guidance is needed regarding the public participation requirements, including specifying the length of the period for public review and comment on State applications and policies required under this part. The Secretary believes that while a definitive timeline requirement, in general, could be helpful to States, States should have some flexibility with regard to public notice and comment periods in order to respond to unforeseen circumstances in their jurisdictions.

Change: A new subheading on "public participation" has been added to Subpart B. All substantive requirements on public participation have been included under that subheading at §§ 303.110 through 303.113. Additional guidance has been added concerning the procedures for use in ensuring that the general public has an opportunity to review and comment on appropriate required documents. Language has been added at § 303.113(a)(2) that enables the lead agency to make any modifications it deems necessary in the application or policy after public review. A provision has been added at § 303.110(a)(3) to require that notice of public hearings be provided at least 30 days before the dates that the hearings are conducted. A provision has been added at § 303.110(b) to permit States to request exemptions from the timeframes when circumstances warrant.

Comment: One commenter requested that the regulations require only one public hearing, in order to be consistent with the hearing requirements under other Federal programs.

Discussion: Section 678(a)(4)(A) of the Act requires "hearings." Moreover, the public hearing provisions under the EDGAR regulations also require "hearings." Although the number of hearings may vary from State to State, depending on geographical and demographical considerations, every State must hold at least two.

Change: A provision has been added at § 303.112 requiring each State to hold a sufficient number of public hearings at times and places to afford interested parties throughout the State a reasonable opportunity to participate.

Comment: Several commenters requested that a provision be added requiring the lead agency to give written notice about the State application and public hearings to advocacy associations, parent groups, and service providers who are interested in early intervention services.

Discussion: Based upon experience with Part B of the Act, the Secretary believes that effective notice can be given without requiring written notice to specific groups.

Change: None.

Statement of Assurances

General (§ 303.120)

Comment: Some commenters were concerned that the provision requiring statements of assurances to be submitted only once would not allow States to amend the information under the assurances.

Discussion: States are required to submit statements of assurances only once. The Secretary agrees, however, that States should be able to revise their statements of assurances, as long as the revisions are consistent with this part.

Change: A new provision has been added to permit States to submit a revised statement of assurances, as long as the revised statement is consistent with the requirements of this part (see § 303.120).

Reports and records (§ 303.121)

Comment: A commenter requested that more guidance be provided on the types of information and records that must be maintained.

Discussion: The Secretary agrees that additional guidance should be provided to ensure that appropriate information is maintained.

Change: A change has been made in § 303.121 to require that records be maintained to demonstrate compliance with the requirements of this part.

Control of funds and property (§ 303.122)

Comment: A commenter asked for guidance regarding the use and administration of funds under this part by the lead agency and State Interagency Coordinating Council.

Discussion: The Secretary agrees that guidance is needed on the use of funds under this part by the lead agency and the Council to facilitate the administration of the program.

Change: Two new sections have been added to the regulations: § 303.560 (Use of funds by the lead agency), and § 303.602 (Use of funds by the Council).

Comment: A commenter requested that the provision on public control of funds and property be clarified regarding the use of those funds by private agencies.

Discussion: The statutory provision in Part H regarding public control of funds and property is common to most formula grant programs in the Department of Education. Procedures for implementing that provision are contained in the EDGAR regulations at 34 CFR Parts 76 and 80. Thus, the Secretary does not believe that additional guidance is necessary.

Change: None.

Prohibition against commingling (§ 303.123)

Comment: One commenter stated that the provision dealing with the prohibition against commingling could be confusing to providers, given the multiple sources of funds that are used by States to provide early intervention services. The commenter suggested that a note be added providing additional guidance.

Discussion: Because the statute requires that funds from a variety of Federal, State, local and private sources be used to implement the program, the Secretary agrees that guidance would be helpful. The Secretary believes that it is appropriate for funds from various sources to be consolidated, as long as there is a clear audit trail for each source.

Change: A note has been added following § 303.123 to provide additional guidance.

Prohibition against supplanting (§ 303.124)

Comment: Several commenters requested additional clarification and guidance on the prohibition against supplanting provision. Some commenters recommended that the fiscal year beginning October 1, 1986, be used as the base year for establishing maintenance of effort.

Discussion: The Secretary agrees that guidance should be provided on the non-supplanting requirement. With respect to the use of 1986 as the base year, maintenance of effort is always dependent upon the most recent previous year for which the fiscal data are available. Therefore, it would not be appropriate to use any given year as a permanent "base year" for meeting this requirement.

Change: Section 303.124 has been revised to provide additional guidance, and a note describing the application of the provision has been added.

Assurance regarding use of funds (§ 303.127)

Comment: Several commenters stated that the language in this section was vague and confusing. They recommended that the section incorporate language from section 679 of the Act.

Discussion: The assurance in § 303.127 (§ 303.30 in the NPRM) is based on section 678(b)(1) of the Act, which provides that a State must "assure that funds paid to the State under section 673 will be expended in accordance with this part." Although the language in section 678(b)(1) is broad enough to encompass the use of funds provision in section 679 of the Act, the Secretary (1) believes that it is important to give specific emphasis to that provision, and (2) agrees with commenters that the assurance in § 303.127 should be amended by adding a reference to section 679 (i.e., § 303.3 of these regulations).

In the NPRM, §§ 303.30 and 303.34 were inadvertently given the same title ("Assurance regarding use of funds"). This has been corrected in these final regulations.

Change: Section 303.127 has been amended by (1) changing the title to "Assurance regarding expenditure of funds," and (2) adding a reference to section 679 of the Act (i.e., § 303.3).

Description of use of funds (§ 303.144)

Comment: One commenter felt that this section did not directly reflect the statutory language and that further guidance was needed. Another commenter requested that "children and families" be added to the paragraph regarding direct services.

Discussion: Given the variety of agencies that could be potential recipients of the funds, the Secretary agrees that this section needs to be more precise, in order to help States account for and make the most effective use of funds. The Secretary also believes that providing additional guidance will assist States in avoiding future audit problems. The Secretary agrees that the phrase "children and families" should be added under direct services.

Change: Section 303.144 has been revised to reflect the need for greater precision and to add "children and their families" to paragraph (d)(1).

Specific Requirements for the Years One Through Five and Thereafter

Comment: Several commenters requested that the sections on application requirements be reorganized, so that they include a complete listing of the requirements for each year.

Discussion: The Secretary recognizes that the way the requirements were organized in the NPRM made it unnecessarily difficult for States to determine what all the application requirements are for each year of participation. Therefore, he agrees that the changes proposed by the commenters should be made.

Change: Section 303.148 and §§ 303.150 through 303.151, regarding applications for years three through five, have been revised to list the requirements for each year. All application requirements related to the components of the statewide system, as included under Subpart D in the NPRM, have been moved to Subpart B and grouped together under a new subheading (see §§ 303.160 through 303.175).

Equitable distribution of resources (§ 303.146)

Comment: One commenter recommended that incidence of handicapping condition be considered in the determination of an equitable distribution of resources in addition to geographical considerations. Other commenters asked that public agencies allow public scrutiny of the methods to ensure that funds are distributed equally to all service providers and that participation on the Council should include representatives from "resource poor" areas.

Discussion: The Secretary believes that the basis for determining an equitable distribution of resources should include a consideration of relative need within the geographical areas of a State. Provisions to ensure an opportunity for public comment on the State's application under this part are in § 303.110 of these regulations. The statute does not require provisions requiring representation on the Council beyond those in section 682(2)(b).

Change: Language has been added to this section specifying that a State must take into account the need for services across all geographic areas within the State.

Third year applications (§ 303.148)

Comment: Several commenters asked for clarification about what constitutes a "policy" in the requirements for third year applications.

Discussion: The Secretary agrees with commenters that clarification is needed regarding the meaning of "policy," as that term is used in this section and in other provisions under this part. A definition of "policies" was included under the public participation requirements in § 303.21 of the NPRM. However, the definition included only a partial listing of required policies under this part, and did not appropriately clarify the meaning of the term. Therefore, the Secretary believes that the definition of "policies" in the NPRM should be replaced with a new definition that includes a more comprehensive list of applicable policies under this part. This definition is consistent with the term "policy", as used in the Part B regulations. The Secretary believes that the definition should be included with the other definitions of general applicability that are in Subpart A of these regulations.

Change: A new definition of "policies," which replaces the definition that was in the NPRM, has been added at § 303.19.

Fourth year applications (§ 303.150)

Comment: Commenters asked that requirements for fourth year applications be amended to include an assurance that the statewide system is in effect in the State, except for full implementation of IFSPs for children.

Discussion: Section 675(b)(1) of the Act requires that a State include in its third and fourth year applications information and assurances that, except for full implementation of IFSPs, the statewide system will be in effect no later than the beginning of the fourth year. The Secretary agrees with the commenters that specific information and assurances should be required in the fourth year applications to demonstrate that the statewide system is in effect, or will be in effect no later than the beginning of the fourth year of the State's participation under this part.

The phrases "before the beginning", "by the beginning", and "no later than the beginning" of a specific year are used interchangeably in the statute to specify the timeliness for phasing-in a statewide comprehensive early intervention system. For purposes of clarity, the Secretary believes that using the phrase "no later than the beginning" uniformly in the regulations will avoid confusion.

Change: Section 303.150 has been amended to include the requested assurance that the statewide system is in effect. The phrase "no later than the beginning" has been uniformly used throughout the regulations.

States with mandates as of September 1, 1986 to serve children with handicaps from birth (§ 303.151)

Comment: A commenter requested that a note be added to this section urging States with mandates from birth (who are exempt from submitting substantive requirements until the fifth year) to meet the same requirements for the third and fourth year that other States must meet, in order to guarantee their compliance at the beginning of the fifth year.

Discussion: The Secretary expects that, as required by the Act, States with mandates from birth, will carry out planning and development activities to ensure that the statewide system is in effect no later than the beginning of the fifth year of their participation. Therefore, a note is not necessary. Further, the note following this section in the NPRM restates requirements that are included in another section in the regulations and is not needed.

Change: The note that accompanied this section in the NPRM has been deleted.

Applications for year five and each year thereafter (§ 303.152)

Comment: Some commenters pointed out that the provision requiring a description of the appropriate early intervention services that will be provided before the beginning of the fifth year was omitted in the requirements for the fifth year application. Commenters also requested that the regulations clarify that the provision requiring the availability of appropriate early intervention services to "all" eligible children is not limited to those children who receive Part H funded services, but includes all children who meet the definition under § 303.16.

Discussion: The provision requiring a description of services to be provided in the fifth year was inadvertantly omitted from the NPRM, and is included in these final regulations. The Secretary agrees that these provisions require States to make available appropriate early intervention services to all eligible children and their families, not just children and families receiving services funded under this part. The determination of what services are appropriate for an individual child is made through the IFSP process.

Change: Section 303.152 has been revised to require (1) a description of the services to be provided no later than the beginning of the fifth year, and (2) a policy that appropriate early intervention services will be available to all children in the State who are eligible under this part and their families.

Comment: A commenter requested further clarification regarding what States must do to meet the requirements for the fifth year. The commenters asked, "If all agencies refuse to pay for a service and parents can't afford the cost, must the service be paid for by the lead agency and what is the ultimate responsibility?" The commenter also asked for the meaning of the terms "appropriate" and "make available," as used in the section (i.e., "make available appropriate services for all infants and toddlers with handicaps") and "in effect," as used in the fifth year application (i.e., "that the State has in effect the statewide system * * *").

Discussion: The legislative history of Pub. L. 99-457 makes clear (1) that the responsibility for the provision of early intervention services rests with the lead agency, not the parents, and (2) that no child is to be denied services because the family cannot afford to pay. As used in the requirement for the fifth year, "in effect" means that (1) all components of the statewide system are being implemented, and (2) each eligible child and the child's family are receiving early intervention services in accordance with a currenty IFSP.

Change: No change has been made in § 303.152. However, in a new section on "Policies related to payment for services" (§ 303.520), a provision has been added that requires a State's funding policies to include an assurance that the inability of the parents of an eligible child to pay will not result in the denial of services to the child or the child's family.

Subpart C—Procedures for Making Grants to States

Formula for State allocations (§ 303.200)

Comment: A commenter recommended that the allocation formula reflect the additional children to be served if the State includes "at risk" in its definition.

Discussion: The formula for State allocations, which uses the number of children from birth through age two in the general population as the basis for determining State allotments, is statutory. There is no basis for a change.

The special definition of "infants and toddlers" from section 684(c)(2)(A) of the Act, which is used for determining

State allocations, was inadvertantly omitted from the NPRM.

Change: No change was made in the formula. However, the statutory definition of "infants and toddlers" that is to be used for determining allocations under this part has been added at § 303.200(b)(2).

Distribution of allotments from non-participating States (§ 303.201)

Comment: A number of commenters were concerned about what action the Secretary might take in distributing funds not awarded to a State if that State did not participate in the program. The commenters recommended that the language in the regulations be changed from "may allot" (as stated in the NPRM) to "shall allot," to be consistent with section 684(d) of the Act.

Discussion: The use of "may" in the NPRM was not intended to imply that reallotment of funds under this part is a decision left to the discretion of the Secretary.

Change: The regulations have been amended by replacing "the Secretary may allot," with "the Secretary reallots" (see § 303.201).

Payments to the jurisdictions (§ 303.204)

Comment: One commenter recommended that the amount allocated to the jurisdictions should be 1.25 percent instead of "up to 1 percent."

Discussion: The maximum percentage that may be allocated to the jurisdictions is established by section 684(a) of the Act. The Secretary does not have the authority to increase the percentage of funds allocated to the jurisdictions.

Change: None.

Subpart D—Program and Service Components of a Statewide System of Early Intervention Services

State definition of developmental delay (§ 303.300)

See comments on § 303.16 in this Appendix (Infants and toddlers with handicaps).

Central directory (§ 303.301)

Comment: Several commenters requested that additional resources, such as professional associations, parent support groups, and advocacy associations, be included in the regulations. Commenters requested that the central directory be made the responsibility of the lead agency and that it describe the nature and scope of early intervention services. Some commenters also stated that the regulations should require that the directory be available on a regional basis and in language other than English.

Discussion: The Secretary agrees that it is appropriate to add "professional and other groups * * *" to the text of the regulations, and to retain, in the note following the section, the examples from the NPRM. The Secretary also agrees that further guidance is necessary to ensure that the directory is accessible to all members of the general public, and that it describes the nature and scope of the early intervention program under this part.

Change: "Professional and other groups" has been added to § 303.301. That section also has been revised to provide guidance on how to make the central directory accessible to the general public.

Identification and Evaluation

Public awareness program (§ 303.320)

Comment: Many commenters asked that the regulations contain more guidance on the public awareness program, including the purpose and scope of the program, and the methods that should be used to inform the public about the statewide system of early intervention services.

Discussion: The Secretary believes that an effective public awareness program is critical to the successful implementation of the State's statewide system of early intervention services. However, he believes that the regulations should focus on the provisions that must be addressed by a State's public awareness program.

Change: Section 303.320 has been revised to add provisions that must be addressed by the public awareness program. Notes have been added to describe effective methods to implement the public awareness program.

Comprehensive child find system (§ 303.321)

Comment: Many commenters asked that the final regulations (1) stress the importance of the child find system being coordinated with all other child find efforts in the State that are conducted under other Federal and State programs, and (2) include more guidance about the system.

Discussion: The Secretary recognizes that Federal and State agencies may have overlapping responsibilities in this area. For example, under Part B, State educational agencies have the responsibility to "identify, locate, and evaluate" children with handicaps from birth through age 21; and the Maternal and Child Health Services Block Grant (Title V of the Social Security Act) requires States to "locate and identify" children with special health care needs. The Secretary believes that the child find system cannot be successful without interagency collaboration and the expansion of present efforts (e.g., the use of newborn screening and tracking systems). The Secretary agrees with commenters that, in order to develop and implement an effective child find system under this part, the system must effectively coordinate with all other child find efforts in the State.

Change: A paragraph on coordination has been added at § 303.321 that requires the lead agency, with the assistance of the Council, to ensure that the child find system under this part is coordinated with all other major child find efforts conducted by other State agencies. A note has been added concerning coordination with other child find systems.

Comment: Several commenters requested (1) that additional referral sources be added to this section (e.g., local educational agencies, and parent education and family support programs) and (2) that more information be provided about procedures and timelines for making referrals. Many commenters expressed concern about the note dealing with the timelines for acting on a referral. Because these comments also concerned the timeline for evaluation and assessment, they are addressed in the discussion concerning § 303.322.

Discussion: The Secretary agrees (1) that examples of other primary referral sources would be helpful, and (2) that more specific information is needed about making a timely referral under this part. Because of the rapidly changing needs of infants and toddlers, the Secretary believes that it is important to establish a very short timeline for referring a child for evaluation or services.

Change: New provisions have been added at § 303.321(d) to (1) include additional referral sources, and (2) require procedures for referring a child to the appropriate public agency within two working days after the child has been identified as needing an evaluation or early intervention services.

Evaluation and Assessment (§ 303.322)

Comment: A large number of comments were received regarding the 30 calendar day timeline in the NPRM (i.e., in the second note following § 303.64, and in § 303.65(d)). Most of the commenters asked that the timeline be extended. They cited the following factors that make the completion of an evaluation within 30 days difficult: (1) Frequent illness among eligible children,

(2) scheduling delays for evaluations from primary referral sources, (3) large distances for travel in rural areas, (4) the need to hold several meetings over time to adequately assess the strengths and needs of families, and (5) 30 "calendar" days translates to 20 "working" days. Suggested timelines ranged from 45 to 90 days. A small number of commenters requested that the timeline *not* be extended, because of the potential harm that might result from delaying the completion of the evaluation process and the provision of early intervention services.

Discussion: The Secretary recognizes that, because the needs of infants and toddlers change so rapidly, a timeline that extends the evaluation and assessment process beyond 30 days must be examined carefully. However, as the factors raised by commenters indicate, a 30-day timeline for completing the evaluation and assessment process may not be realistic. The Secretary believes that a 45 calendar day timeline would provide the best balance between the need for a timely evaluation and the factors that need to be taken into consideration in the evaluation and assessment process. Because there may be exceptional circumstances that could mitigate against the completion of the evaluation and assessment, and preparation of the IFSP within 45 days, the Secretary believes that special procedures should be developed in order to ensure that an eligible child would not be denied needed services as a result of a delay in completion of the full evaluation and assessment process.

Change: The following changes have been made: (1) The second note under § 303.64 in the NPRM has been deleted; (2) § 303.321(e) has been added, which establishes a 45-day timeline for a public agency to act on a referral (i.e., to complete the initial evaluation and assessment activities and hold the initial IFSP meeting); (3) § 303.322(e), which replaces the timeline in § 303.65 of the NPRM and includes a reference to the 45-day timeline in § 303.321(e), has been added; (4) a requirement has been added at § 303.322(e)(2) to ensure that the lead agency adopts procedures for developing an interim IFSP in exceptional circumstances when public agencies cannot complete the evaluation and assessment process within 45 days; and (5) the term "days" has been defined as calendar days (see § 303.9).

Comment: Several commenters recommend that "interdisciplinary" or "transdisciplinary" be used instead of "multidisciplinary," when referring to evaluation and assessment requirements, because the former terms imply greater interaction and coordination among team members than "multidisciplinary." Other commenters recommended that "multidisciplinary" be used, because that term appears in the statute.

Discussion: The Secretary agrees that teams providing evaluations and assessments and developing IFSPs should function in a coordinated, integrated, and comprehensive manner consistent with the overall purpose of the program. However, he believes (1) that the term "multidisciplinary" should be used, since it is the statutory term, and (2) that a definition of "multidisciplinary" would assist States in understanding how the term is used under this part.

Change: A definition of "multidisciplinary" has been added at § 303.17.

Comment: A number of commenters addressed the issue of participation by families of eligible infants and toddlers in the evaluation and assessment process. The commenters (1) recommended that parental consent be required at all stages, (2) stated that it would be appropriate to base the assessment of families on information provided by the families themselves, and (3) suggested that requirements be added to ensure that the family assessment is conducted by trained personnel utilizing appropriate methods and procedures, and that a family's participation in the assessment be voluntary.

Discussion: The Secretary is committed to ensuring that the families of children eligible under this part are able to assume a full and active role in the provision of early intervention services to their children. The Secretary believes that consent requirements, like those under Part B, afford important protections to parents and their children. The Secretary is also committed to ensuring that family assessments involve the actual participation of the families.

Change: A provision has been added at § 303.322(d) that clarifies the purpose of, and procedures for, the family assessment requirements. A new section on parental consent has been added at § 303.404.

Comment: Some commenters requested that clarification be provided regarding what is meant by a one and two step process in the note following § 303.65 in the NPRM. Other commenters asked for more information about the meaning of the terms, "evaluation" and "assessment," pointing out that the terms were used interchangeably by Congress. Another commenter favored the use of the term "assessment" for families rather than "evaluation", because the latter term connotes a value judgment being made by a professional about the family.

Discussion: The Secretary recognizes that the terms "evaluation" and "assessment" are sometimes used interchangeably in the Act. However, "evaluation" is most often used in the context of conducting a multidisciplinary evaluation to determine if a child is entitled to services, and "assessment" is generally used in the context of planning services for the IFSP. Therefore, the Secretary believes that it is important to distinguish between the meanings of these terms. The Secretary agrees that the use of the term "family assessment" is more appropriate, because determining family needs and strengths is meant to identity the family services necessary for the child to benefit from early intervention services. The Secretary recognizes that there are many steps in the evaluation and assessment process, and agrees that explanatory notes describing this effort as a one or two step process may be confusing.

Change: The terms "evaluation" and "assessment" have been defined at § 303.322(b). The discussion of the one or two step process has been deleted.

Comment: Several commenters requested that specific areas, including hearing, vision, and health status, be included in the requirements for evaluation and assessment.

Discussion: Vision and hearing have been included as part of physical development in the list of required developmental areas, as a result of comments to this and other sections. Since a child's health status can affect all other areas of development, the Secretary agrees,that obtaining information about the child's health status should be part of the evaluation.

Change: The five areas of development referenced in the NPRM have been specifically listed in § 303.322(c)(3)(ii), and vision and hearing have been added to physical development in that list. A requirement that the child's evaluation and assessment include a review of all pertinent medical and health records has been added at § 303.322(c)(3)(1).

Comment: A number of commenters recommended that a provision be added to (1) require that all evaluation and assessment procedures be nondiscriminatory, and (2) stress the importance of using culturally appropriate methods and procedures.

The commenters were concerned that without such protections children would be improperly labeled as handicapped.

Discussion: The Secretary agrees that a provision on non-discriminatory evaluation procedures should be added. Experience with Part B has demonstrated the importance of these protections in avoiding misclassification.

Change: A new section on nondiscriminatory procedures in evaluation has been added at § 303.323.

Individualized Family Service Plans

General (§ 303.340)

Comment: Several commenters asked that the role of the family in the development of the IFSP be more explicit. A few commenters recommended that a definition of "family" be added to the revised regulations.

Discussion: The Secretary agrees that more precise information is needed about the role of the family in the development of the IFSP. However, he does not believe that it is appropriate to include a definition of "family" in the regulations, because to do so could limit the authority of participating States to respond to diverse familial patterns as the States may find necessary to further the provision of early intervention services to infants and toddlers eligible under this part.

Change: A provision stating that IFSPs must be developed jointly by the agency and the family has been added (see § 303.340(b)).

Meeting the IFSP requirements for years four and five (§ 303.341)

Comment: Several commenters responded to the note discussing the timing of the IFSP meeting (see § 303.66 in the NPRM) by suggesting that there be one timeline for completing the evaluation and assessment and another for holding the IFSP meeting.

Discussion: The Secretary believes that it is preferable to require a single timeline for both completing the evaluation and assessment process and conducting the initial IFSP meeting (i.e., the 45-day timeline in §§ 303.321 and 303.322).

Change: The note in the NPRM regarding the timing of the IFSP has been deleted. A single timeline of 45 days has been established for completing the evaluation and assessment process for conducting the initial IFSP meeting.

Comment: Several commenters asked that the regulations provide specific guidance regarding who should and can participate in IFSP meetings.

Discussion: The Secretary agrees that more information should be provided regarding the participants in IFSP meetings.

Change: Section 303.343, which lists the participants in IFSP meetings and describes the circumstances under which information from an absentee participant is obtained, has been added.

Procedures for IFSP development, review, and evaluation (§ 303.342)

Comment: A number of commenters asked for more guidance on the periodic review and annual evaluation of the IFSP. They asked how the meetings would be conducted, who should participate, and whether meetings should be held if a child or family's needs change.

Discussion: The Secretary believes that the IFSP review and evaluation process should provide opportunities for all necessary participants to review or revise the IFSP, if appropriate, based upon child and family needs. The six-month interval is a minimum requirement, since the needs of some children may require more frequent meetings. The Secretary agrees that more guidance is needed about this process.

Change: Section 303.342 has been revised to specify the procedures for IFSP development, review, and evaluation. A note has been added to clarify that the annual review meeting incorporates the periodic review.

Content of IFSP (§ 303.344)

Comment: A number of commenters requested that additional aspects of physical development be included in the IFSP (e.g., vision and hearing, and a statement of the child's health status).

Discussion: The Secretary agrees that the child's health status (which can directly affect the child's development) and vision and hearing should be included in the IFSP.

Change: The requested changes have been added at § 303.344(a).

Comment: A number of comments were received about the provision requiring the IFSP to include a "statement of the family's strengths and needs." Some commenters recommended a more explicit role for family members in the determination of the family's strengths and needs. Commenters recommended incorporating the following concepts: (1) That the family's level of participation should not be the basis for services, (2) that families should be able to elect to receive some services and not others, and (3) that the regulations should be flexible enough to permit families to participate to different degrees according to their own needs.

Discussion: The Secretary is sensitive to the many issues raised by the commenters regarding the rights of parents and other family members in the process of conducting the family assessment and developing the IFSP, and believes that the regulations should be amended to reflect those rights. In addition, the Secretary believes that more guidance should be given to the variety of roles that family members play in enhancing their child's development.

Change: New provisions that stress the "concurrence" of the family in determining its strengths and needs related to enhancing the development of the child have been added at § 303.322(d) and § 303.344(b). A note has been added following § 303.344 to emphasize that public agencies should be sensitive to the variety of roles that family members play in enhancing the development of the child.

Comment: Some commenters felt that agencies should not be responsible for family needs that extend beyond those that pertain to an eligible child's handicapping condition. Other commenters stated that a family's socio-economic status, social support networks, and cultural norms are important considerations in planning for services.

Discussion: The Secretary believes that agencies are not responsible for family needs that are not related to the needs of the child as identified in the IFSP. The Secretary recognizes that it is important for public agencies to consider any area related to the family's ability to enhance the development of the eligible child in planning services.

Change: None.

Comment: Several commenters stated that medical and other services that are not required under this part may be important to enable a child to benefit from the provision of early intervention services. The commenters recommended that, to the extent appropriate, those services be identified in the child's IFSP, even though they will be paid for from other funding sources (e.g., private insurance, and Titles V and XIX of the Social Security Act).

Discussion: The Secretary agrees that, to the extent appropriate, the IFSP should include the medical and other services that a child needs but that are not required under this part. The Congress recognized the importance of coordinating all health and medical services when it stated in the House Report that one function of case management is to "cooordinate the provision of early intervention services with other services (e.g., medical services for other than diagnostic and evaluation purposes)."

Change: The following changes have been made: (1) A note has been added following § 303.13 (Health services) to encourage States to identify all of the services that the child needs, including funding sources for these services; (2) a provision regarding coordination of early intervention services with other services has been added to the definition of case management in § 303.6; and (3) section 303.344 has been amended to require that the IFSP include a list of "other services" that may be needed.

Comment: Commenters recommended adding various requirements about the statement of major outcomes in the IFSP. These ranged from adding statement about strategies and options for procuring services to using descriptive or narrative approaches rather than traditional objective criteria. One commenter stated that family goal statements could be misinterpreted if families were told by professionals that they needed to meet certain goals.

Discussion: The Secretary recognizes that there are various ways of projecting outcomes in the IFSP to meet the unique needs of an eligible child and the child's family. The Secretary does not believe it is appropriate to specify particular methods for projecting outcomes, since no one method would apply in all circumstances.

Change: None.

Comment: Some commenters asked for further guidance about the meaning of the terms "frequency," "intensity," and "method," and requested that a provision be added requiring the IFSP to include a description of where services are to be provided.

Discussion: The Secretary agrees that more information is needed about the meaning of the terms, "frequency," "method," and "intensity," and that the location of services should be added.

Change: The term "location" has been added to "frequency," "intensity," and "method," at § 303.344(d)(i). Definitions of these terms have been added at § 303.344(d)(2).

Comment: A number of comments were received about the provision requiring that the IFSP include "the name of the case manager from the profession most immediately relevant to the child's or family's needs * * *" Some commenter stated that the case manager should be a person employed by the lead agency. Other commenters suggested that case managers be independent from agencies providing early intervention services. One commenters stated that case management could be considered a profession.

Discussion: The Secretary believes that case management can be carried out in a variety of ways that are consistent with the provisions of this part and existing State law, including the designation of case management as a profession.

Change: The following changes have been made: (1) A paragraph has been added to § 303.6(c), which states that case managers may be appointed in any way permitted under State law, so long as it is consistent with the requirements of this part; and (2) a new provision has been added at § 303.344(g)(3) to clarify that "profession" includes case management.

Comment: Many commenters requested further guidance on the steps required in the IFSP to support the transition of children upon reaching age three to preschool services under Part B or other services. Some commenters called for a formal transition plan that would include parental education, support networks, and specification of the services necessary to facilitate the transition into a preschool program where the child is integrated with non-handicapped peers. Other commenters asked that additional consideration be given to transitions to other services in typical child care settings, and for services to ensure continuity for "the child who experiences frequent hospitalizations."

Discussion: The Secretary agrees that more guidance should be provided regarding the steps to be taken to facilitate the transition of a child from Part H to Part B upon turning three years of age, or to other appropriate placements. The IFSP requirements in the Act specifically call for the identification of steps to be taken to support the transition of a toddler with handicaps to services provided under Part B to the extent that such services are considered appropriate. The Secretary recognizes, however, that some children who are eligible for services under this part might not be found to be "handicapped" under the definition of handicapping conditions under Part B. Therefore, it is important to plan transitions for children who will not be entering the Part B program.

Change: Additional guidance has been added at § 303.344(h) regarding the steps to be taken to support the transition of a child from early intervention services to preschool services under Part B or other appropriate placements. A note has been added to that section stressing the importance of a coordinated effort during the transition period.

Comment: Many of the comments that were received on the NPRM for the Preschool Grants program (section 619 of the EHA) requested more information about the requirements for transition when a child moves from services under Part H to Part B. Commenters recommended that provisions be added to ensure that a child turning three years of age during a school year would not have to wait until the beginning of the following year to receive services under Part B. Commenters asked that guidelines be provided for the transition period, in order to eliminate disruptions in services and properly assign financial responsibility to appropriate agencies prior to and after a child turns three years of age.

Discussion: The Secretary agrees that a smooth transition from the Part H to the Part B program is very important. Since the statute limits the use of Part H funds to children birth through two, the Secretary cannot authorize the use of Part H funds after a child turns three. States are encouraged to take steps to facilitate a smooth transition of children from Part H to Part B.

Change: A note has been added following § 303.344 that provides information regarding the use of interagency agreements to help ensure the smooth transition of children from services under Part H to services under Part B.

Provision of services before evaluation and assessment are completed (§ 303.345)

Comment: Many commenters supported the provision that services could be initiated before the evaluation and assessment process is completed. One commenter suggested that evaluation and assessment be considered a part of the services offered, and therefore, services could be planned while the evaluation and assessment are in progress. Some commenters, however, were concerned about the provision of services without the benefit of a comprehensive evaluation and assessment. The commenters suggested that, if services are provided before the evaluation and assessment process is completed, consent be obtained from the parents, and an interim IFSP be developed. Commenters requested that more guidance be provided regarding implementation of this provision.

Discussion: The Secretary agrees that more guidance is needed regarding the conditions under which services may be provided if the evaluation and assessment process is delayed. If services are initiated, the evaluation and assessment process must continue in a timely fashion.

Change: Section 303.345 has been revised to clarify what conditions must be met if services are to be provided before the evaluation and assessment is completed. The note following that section has been revised to clarify the intent of the section.

Personnel Training and Standards

Comprehensive system of personnel development (§ 303.360)

Comment: Several commenters expressed concern about incorporating provisions from the Part B comprehensive system of personnel development (CSPD) under this part unless requirements related to training early intervention personnel can be clearly met. One commenter suggested that this section include an additional requirement to ensure that training under the Part H CSPD be specifically related to the interrelated psychosocial, health, developmental, and educational needs of eligible children, and to the continuing role of the family. Several commenters recommended inservice and preservice strategies to meet the provisions requiring that training occur on an interdisciplinary basis and include parents, professionals from a variety of disciplines, and paraprofessionals.

Discussion: The Secretary agrees that the content of the training provided under the Part H CSPD should be related to the specialized training needs of all personnel providing early intervention services, and that training should be provided on an interdisciplinary basis.

Change: A new provision has been added at § 303.360(b)(3) to require that training provided under this part be designed to (1) meet the interrelated psychosocial, health, developmental and educational needs of infants and toddlers with handicaps, and (2) assist families in enhancing the development of their eligible children.

Personnel standards (§ 303.361)

Comment: A significantly large number of comments were received on the personnel standards provision. Most of the commenters requested that the "alternative standards" provision in the NPRM be deleted, in order to ensure that early intervention personnel would meet the "highest requirements" in the State applicable to their given profession or discipline. Some commenters stated that standards must be related specifically to competencies needed to serve children eligible under this part and their families. Commenters from several different disciplines stated that a field, such as "psychology", is too broad to be treated as one profession or discipline (e.g., the "highest requirements" may be different for school psychologists than for clinical psychologists).

Discussion: The statutory provision on personnel standards is virtually the same under both Parts B and H. Because of this, most of the comments related to personnel standards that were received on each NPRM apply to both programs. The Part H NPRM, which was published on November 18, 1987, included an alternative standards provision. On the basis of extensive public comment calling for deletion of the alternative standards provision, that provision was not included in the Part B NPRM published on March 14, 1988. A large number of comments were received on the personnel standards provision in the Part B NPRM. An analysis of those comments and the changes made since publication of that NPRM are included in the preamble to the final regulations for Part B published on April 27, 1989 (54 FR 18248 through 18256). The provision on personnel standards in the final regulations for both Part B and Part H are virtually identical. The Secretary agrees with commenters that, in a broad occupational field, such as psychology, there may not be one "highest requirement". Thus, the Secretary recognizes that school psychologists are members of a specific occupational category who have training requirements appropriate for their responsibilities under Part B and Part H of the Act.

Change: The personnel standards requirements in the Part B final regulations have been incorporated into these regulations, but have been modified to apply to the program under this part.

Subpart E—Procedural Safeguards

General responsibility of lead agency for procedural safeguards (§ 303.400)

Comment: Many commenters stated that the Safeguards under Part H and Part B should be identical. Commenters were concerned that the safeguards in the NPRM were inadequate and did not offer the same degree of protection as those under Part B, expecially in terms of general rights in the redress of grievances. Some commenters felt that it would be confusing for parents to have to adapt to a new set of safeguards when their children changed programs at age three. In addition, many commenters requested that the requirements from Part B related to parental consent and other parental rights be incorporated into the procedural safeguards under this part. A few commenters felt that the Part B due process procedures did not allow for the quick resolution of disputes necessary for infants and toddlers.

Discussion: The Report of the House of Representatives on Pub. L. 99–457 states that it is "* * * the Committee's intent that the procedures developed by a State result in speedy resolution of complaints because an infant's development is rapid and therefore undue delay could be relatively harmful." However the Report adds that the Secretary may approve any system that includes the full set of safeguards contained in Part B.

In the NPRM, the Department of Education attempted to balance the congressional intent for streamlined procedures under this program with the need to protect the rights of parents and children. The provision in the NPRM gave the States the option of adopting the Part B safeguards, adopting selected parts of the Part B safeguards and developing new procedures for the remaining safeguards required under Part H, or establishing new safeguards.

Based upon the weight of the comments, the Secretary has determined that parental consent and certain of the parent and child rights specified in the Part B regulations are basic procedural safeguards that should apply to all children, including those eligible under this part, with appropriate modifications for the Part H program.

Because many of the procedural safeguards in the Part B regulations have been adapted and added to this part, the provision in the NPRM regarding State options related to procedural safeguards has been changed to limit the options to either (a) adopting the due process procedures in the Part B regulations (34 CFR 300.506 through 300.513), or (b) developing new impartial procedures for resolving individual child complaints, as required in §§ 303.420 through 303.424. Even within these options there is considerable overlap. The main distinctions between the two are that the provisions in §§ 303.420 through 303.424 of this part (1) are less formal, and (2) are designed to result in a more streamlined, time-saving resolution of an individual child complaint (e.g., a 30-day timeline versus 45 days under Part B, and no administrative appeal procedures).

Change: The provisions on procedural safeguards in the new Subpart E have been reorganized and expanded. They include additional requirements concerning parental rights, and incorporate certain provisions from the Part B regulations, with appropriate modifications for the Part H program.

including (1) the definitions of consent, native language and personally identifiable information at § 303.401, (2) parental consent at § 303.404 and (3) parental rights in administrative proceedings at § 303.422.

Language has also been added to § 303.402 to make clear that requirements related to the opportunity to examine records is in accordance with the confidentiality procedures under Part B, and that those parent rights with regard to records extend to all areas under this part that involve records about the child and the child's family.

A change has been made at § 303.420 to give States the option of (1) adopting the due process procedures in 34 CFR 300.506 through 300.512, or (2) developing procedures that meet requirements in §§ 303.421 through 303.425 and provide parents an easy and simple means of filing a complaint.

Comment: Several commenters felt that the regulations should add a provision to clarify that the lead agency is ultimately responsible for ensuring implementation of the procedural safeguards, even though the lead agency may designate another agency to conduct hearings and implement the requirements.

Discussion: The lead agency is statutorily responsible for ensuring the effective implementation of all provisions under the statewide system of early intervention services, including procedural safeguards in Subpart E. However, the Secretary agrees that the regulations should specifically state that the lead agency remains responsible for procedural safeguards.

Change: A provision has been added to clarify the lead agency's responsibility. (See § 303.400)

Prior notice; native language (§ 303.403)

Comment: With respect to the requirement that the notice be written in the native language of the family, some commenters requested that the qualifying phrase "unless it is clearly not feasible to do so" be deleted.

Discussion: The qualifying phrase was intended to apply in situations where it is not possible to find someone with the knowledge or skills needed to translate a notice, or where there is no written language. The provisions on prior notice and native language in the Part B regulations describe the steps to be taken should such a situation occur. The Secretary believes that the addition of the Part B language in these regulations would clarify what action should be taken where it is not feasible to provide written notice.

Change: Language from the Part B regulations, regarding the steps to take where it is not feasible to provide notice in the native language, has been added at § 303.403(c).

Surrogate parents (§ 303.405)

Comment: Several commenters expressed concern about the prohibition against a surrogate parent being an employee of "a State agency providing services to the child." They recommended that "State" be deleted from the requirement, so that the prohibition would include employment in any agency providing services to the child. Other commenters felt that a surrogate parent should only be chosen by the biological parents of a child. Some commenters requested more clarification on the surrogate parent role.

Discussion: The Secretary agrees that there is a potential for conflict-of-interest if a surrogate parent is an employee of any agency providing services to the child. A provision requiring only the biological parent to designate the surrogate parent would not be appropriate because the purpose of the surrogate parent provision is to ensure that the child has an adult to represent the child's interests when the parents are unknown or unavailable. The Secretary agrees that more guidance is needed to ensure the effective implementation of this provision.

Change: The Part B procedures, which include the role of a surrogate parent, have been adapted and added at § 303.405. A provision has been added to those procedures that prohibits a surrogate parent from being an employee of any agency involved in the provision of early intervention or other services to the child.

Comment: A commenter requested that language be added to clarify the criteria and procedures for an agency to follow in determining that a child's parents are "unavailable."

Discussion: The Secretary's experience under Part B is that additional guidance is not necessary.

Change: None.

Administrative resolution of individual child complaints by an impartial decision-maker (§ 303.420)

Comment: A number of commenters stated that the note on mediation following § 303.76 of the NPRM should be revised to ensure that mediation is not used to deny or delay the resolution of a complaint or the provision of early intervention services. Commenters recommended (1) that the regulations clarify that parents are not required to participate in mediation, and (2) that agencies be held to the 30-day timeline for resolving complaints.

Discussion: The Secretary believes that mediation is often a helpful tool for quickly resolving many complaints and that it should be retained as an option for parents. However, he agrees with commenters that mediation cannot be used to delay or deny the resolution of a complaint or the provision of services, and that the participation by parents must be voluntary.

Change: The second note following § 303.420 has been revised to include the requested changes.

Comment: Some commenters requested that the provisions relating to the payment of attorneys' fees under Part B of the Act be incorporated in this part, in order to ensure greater legal protection for parents.

Discussion: The attorneys' fees provision in section 615 of the Act applies only to those rights established under Part B. In those cases where a child is eligible under both Part B and Part H, if a child's parent chooses to use the Part B procedures under section 615, the attorneys' fees provision would apply. An example of an item that would be covered under both Part B and Part H is evaluation. In States that have a mandate to serve children from birth, any rights covered by that mandate can be the subject of a due process hearing under section 615 of the Act.

Change: None.

Comment: Several commenters requested that complaint procedures, similar to the EDGAR complaint procedures, be added. Commenters were particularly concerned about having procedures for systemic complaints.

Discussion: The Secretary agrees that it is important to have procedures for resolving complaints. The NPRM incorporated by reference the EDGAR complaint procedures (34 CFR 76.780 through 76.782). However, since the publication of this NPRM, the Department has published an NPRM on the EDGAR regulations that proposes to remove the complaint procedures from Part 76. The complaint procedures that have been included in this part conform to the procedures that have been proposed for inclusion in the Part B regulations.

Change: Complaint procedures have been added at §§ 303.510 through 303.512.

Comment: One commenter noted that the NPRM did not include procedures, similar to those under Part B, that allow agencies to use the due process procedures to override a parent's refusal to consent to an initial evaluation of any potentially handicapped child.

Discussion: Regulations under Part B of the Act contain procedures to enable a public agency to initiate a due process hearing or use other procedures to override a parent's refusal to consent to an initial evaluation of the infant or toddler. Because of the unique nature of Part H, and the fact that the Part B override procedures may be used for initial evaluations, the Secretary does not believe that a specific consent override should be included in this part.

Change: A note has been added to § 303.404 (Parent Consent) indicating that the Part B override procedures for initial evaluations apply to eligible children under this part.

Appointment of an impartial person (§ 303.421)

Comment: One commenter asked for additional information on the meaning of the "record of the proceedings."

Discussion: The Secretary's experience under Part B of the Act, which uses the same phrase, is that the meaning is clear. Therefore, additional guidance in these regulations is not necessary.

Change: None.

Comment: Some commenters requested that the phrase "to the child involved in the complaint" be deleted from the requirement that an impartial person not be "an employee of any agency involved in providing early intervention services to the child involved in the complaint."

Discussion: To ensure objectivity in the complaint resolution process, the Secretary believes that the impartial person should not be an employee of any agency or program involved in the provision of early intervention services or the care of the child, especially since the entire Part H program is a State-run program under the responsibility of the lead agency.

Change: The phrase "to the child involved in the complaint" has been deleted, and a prohibition against the use of an employee of any agency or program involved in the provision of early intervention services or in the care of the individual child has been added at § 303.421(b)(1)(i).

Convenience of proceedings; timelines (§ 303.423)

Comment: A commenter requested clarification about whether a State that adopts the Part B safeguards must follow the 30-day timeline in Part H, or the 45-day timeline in Part B. One commenter stated that States should be allowed 60 days.

Discussion: A State that develops new procedures under this part must follow the 30-day timeline under § 303.423. States that adopt the due process procedures under Part B are permitted 45 days to conduct a due process hearing. However, because the needs of infants and toddlers with handicaps change so quickly, the Secretary encourages those States that elect to use the Part B due process procedures to accelerate the timeline to 30 days.

Change: A note has been added following § 303.423 to (1) clarify that States adopting the Part B due process hearing procedures have 45 days to complete a hearing, and (2) encourage those States to meet the 30-day timeline under this part.

Comment: A few commenters requested that "reasonably" be deleted in the phrase referring to times and places to hold administrative proceedings. One commenter stated that, in order to ensure that proceedings are convenient for parents, agencies must be willing to meet in the evening or on weekends.

Discussion: The Secretary agrees with commenters that public agencies must attempt to conduct administrative proceedings at times and places that enable parents to participate. The Secretary believes that this goal can be accomplished within the existing language in this section.

Change: None.

Status of child during proceedings (§ 303.425)

Comment: A commenter asked what would happen if the parent and public agency were unable to agree on any initial services.

Discussion: If all services are in dispute, then no services can be initiated. However, if there is agreement about one or more service, the service or services agreed upon can be initiated.

Change: None.

Confidentiality of information (§ 303.460)

Comment: Many commenters stressed the importance of having strong confidentiality protections for children and families under this part. Some commenters requested that the regulations that implement the Family Education Rights and Privacy Act (FERPA) (34 CFR Part 99), or regulations similar to those in Part B, be incorporated in the requirements under this part. One commenter recommended that parents have the right to exclude information from the records that they feel is not pertinent to development of the IFSP.

Discussion: The Secretary agrees with the commenters' concerns about the need for strong safeguards to protect the privacy of families and the need to incorporate these requirements in this part. The Secretary has determined that the Part B standards should be adopted for the program. Part B standards address parents' rights to exclude information from their child's records.

Change: The confidentiality requirements under Part B of the Act (34 CFR 300.560 through 300.576) have been incorporated by reference in these final regulations. The Part B requirements reference the FERPA requirements. Thus, both the Part B and FERPA requirements in Part 99 apply to this part.

Comment: One commenter felt that the confidentiality provision should be deleted. Another commenter recommended that direct service agencies be exempt from the confidentiality requirements, because the requirements "have been a major deterrent to team delivery of services, cause delays in essential services, and often lead to duplicative efforts among agencies."

Discussion: The Secretary believes that the rights of families must be fully protected; therefore, it would be inappropriate either to delete the confidentiality provisions or to exempt service providers from those provisions. If there are problems in effectively implementing the confidentiality provisions at either the State or local level, it would be appropriate for corrective actions to be initiated on an interagency basis.

Change: None.

Subpart F—State Administration

Lead agency establishment or designation (§ 303.500)

Comment: Many commenters requested that the provision stating that the lead agency is responsible for the general administration, supervision, and monitoring of programs and activities receiving assistance under this part be revised to specifically encompass all programs and activities within the statewide system of early intervention services, regardless of whether they receive funds under this part.

Discussion: Section 300.500 incorporates language from section 676(b)(9)(A) of the Act. Therefore, the Secretary had determined that no change should be made. However, it is clear from the other duties and responsibilities included under section 676(b)(9) that the lead agency has a broad coordinative role that applies to all public agencies in the State that are involved in the early intervention program, regardless of whether those agencies receive funds under this part.

The Report of the House of Representatives on Pub. L. 99–457 states the following regarding the need for final responsibility to be in a lead agency:

> Without this critical requirement, there is an abdication of responsibility for the provision of early intervention services for handicapped infants and toddlers. Although the bill recognizes the importance of interagency responsibility for providing or paying for appropriate services, it is essential that ultimate responsibility remain in a lead agency so that buck passing among State agencies does not occur to the deteriment of the handicapped infant or toddler. (House Report No. 99–860, 14 (1986).)

Change: None.

Comment: A number of commenters asked that the regulations provide guidance concerning the authority and responsibility of the lead agency and other State agencies in the establishment of interagency agreements and in the resolution of disputes.

Discussion: The Secretary agrees that it is important for the regulations to provide additional guidance on interagency agreements and the responsibilities of the lead agency in resolving disputes, in order to enable agencies to develop and implement effective interagency agreements. The Secretary believes that, with respect to intra-agency disputes, the lead agency must ensure that interagency agreements include a process that (1) permits each agency to resolve its own internal disputes, and (2) provides a mechanism for the lead agency to follow in the event that an agency is unable to resolve its own dispute in a timely manner. In this case, the lead agency may use any mechanism permitted under State law to ensure that the intra-agency dispute is resolved.

Change: Two sections have been added to address the above concerns: (1) section 303.523 (Interagency agreements), and (2) § 303.524 (Resolution of disputes).

Comment: Several commenters requested that the regulations clarify that the State Interagency Coordinating Council can serve as the lead agency.

Discussion: The statute makes it clear that a State must have two separate and distinct entities: (1) A lead agency that is responsible for the general administration of the program under this part (section 676(b)(9)), and (2) a State Interagency Coordinating Council that is responsible for advising and assisting the lead agency in the performance of its responsibilities. Thus, it is not possible, under the Act, for the Council to serve as the lead agency.

Change: None.

Policies and Procedures Related to Financial Matters

Policies related to payment for services (§ 303.520)

Comment: Many commenters requested that the regulations provide specific guidance about the conditions under which agencies can charge families for services under this part. Some commenters were concerned that the sliding fees provision would be used to deny services to families. Another commenter stated that States will need assistance and guidance in deciding how to utilize funds most appropriately from various sources in supporting early intervention programs. Other commenters recommended that the regulations specify that early intervention services "are provided at no cost, unless Federal or State laws existing prior to enactment of Pub. L. 99–457 provides for a system of payments by families including a schedule of sliding fees."

Discussion: The Secretary recognizes that the question of payment for early intervention services is one of the most critical implementation issues under this part. The Secretary agrees with commenters that additional guidance is needed regarding policies and procedures related to financial matters. He believes that, among other things, a State's policies must include (1) a list of those functions and activities that must be carried out at public expense (see § 303.521(b)), (2) a statement consistent with congressional intent that no children are to be denied service because of their parents' inability to pay (see § 303.520(b)(3)(ii)), and (3) a list of services that may be subject to a system of payments, including a schedule of sliding fees (see §§ 303.12(a)(3)(iv) and 303.521(a)).

The legislative history of the Act contains several statements about the "sliding fees" provision in §§ 303.12(a)(3)(iv) and 303.521(a), including the following:

> This [provision] is not intended to signal congressional toleration of undue financial burdens on parents. States participating in this program accept responsibility for providing early intervention services. This legislation recognizes that universal access to services gives the States—not the parents—the chief responsibility for the provision of services required by the Act. The services * * * must be made available to handicapped infants and toddlers on the basis of their need and not on the basis of a family's ability to pay. It must be understood that the act bars the reliance on such laws if they create a financial barrier to infants receiving the required services. (Cong. Rec. S. 13504, Senator Weicker (September 24, 1986))
>
> [T]his provision should not be construed as permitting a State to charge a parent for particular services if such services must be provided to them free of charge under a separate federal or state law. That is, this law is not designed to supersede provisions included in other laws. (Cong. Rec. H. 7903, Congressman Williams (September 23, 1986))

The Secretary believes that (1) any system of payments must conform to the laws of individual States, and (2) while there are only certain activities for which fees can be charged, States should have the ability within those limitations to develop fee systems that are responsive to their own needs. Therefore, the Secretary believes that a State's ability to develop such a fee system should not be limited solely to those statutes that were in place prior to the enactment of Pub. L. 99–457.

The Secretary agrees with commenters that specific guidance is also needed concerning the identification and coordination of funding resources from Federal, State, local and private sources.

Change: The information concerning policies related to financial matters in §§ 303.83 through 303.85 of the NPRM has been reorganized and expanded, including the addition of sections to provide guidance concerning: (1) Policies related to payment for services (§ 303.520), (2) the charging of fees (§ 303.521), and (3) lead agency responsibility for the identification and coordination of resources (§ 303.522).

Policy for contracting or otherwise arranging for services (§ 303.526)

Comment: Many commenters requested that (1) a provision be added to ensure that contracted services meet State standards, and (2) a note be added to clarify the intent of Congress that existing public and private early intervention programs and services be used to the extent possible. Another commenter asked that the policies by which contracts for services are awarded be made available to providers. Other commenters asked for the inclusion of procedures to challenge the adequacy of lead agency funding of service providers.

Discussion: The Secretary believes that it would be helpful to state specifically in § 303.526 that all services provided by contract or other means must meet State standards. The Secretary believes that the policy for contracting or otherwise arranging for services should describe how the awarding process works. He also agrees with commenters on the importance of clarifying congressional intent that lead agencies use existing sources of early intervention services to the extent possible. However, the Secretary believes that the language of the NPRM needs to be revised to correct implications in the NPRM that, because of the use of the words "application" and "apply," lead agencies have the authority to make subgrants under this program. In contrast to many other Federal special education laws, the statute for this program neither specifically authorizes subgrants nor does it identify any eligible subgrantees. The Secretary also believes that each lead agency must have reasonable flexibility to enter into contractual or other arrangements that are responsive to the variety of services that may be needed and the diversity of situations and needs throughout the State. The ambiguous language of the NPRM could be read as requiring absolute uniform contract terms or requirements for other arrangements across all situations in a State. The Secretary believes that the State's policy with regard to contracting or otherwise arranging for early intervention services should describe the methods and processes used to make awards or other arrangements and the general provision or conditions or terms that would have to be met by any provider seeking to provide early intervention services for the lead agency. Service providers should not be entitled to any special mechanism to challenge lead agency funding decisions under this part, outside of those otherwise available to a potential or actual participant in a contract or other arrangements.

Change: Section 303.526 has been revised to provide that a State's policy must include (1) a requirement that all early intervention services must meet State standards and be consistent with the provisions of this part, (2) the mechanisms used and the processes followed for awarding funds or making other arrangements for the provision of early intervention services, and (3) the basic requirements that must be met by any service provider in order to receive funds available under this part. A note has been added following the section regarding congressional intent that existing services be utilized by the lead agencies to the extent possible.

Payor of last resort (§ 303.527)

Comment: Commenters asked for guidance on how the lead agency responsibilities for identifying and coordinating all funding sources and assigning financial responsibility related to the payor of last resort provision. One commenter pointed out that because of the importance of using all existing funding sources, including those under other Federal programs, it is essential that the regulations provide guidance as to how this is to be accomplished. Some commenters thought that certain provisions regarding the "payor of last resort" in section 681 of the Act, had been omitted and should be addressed. They requested that a provision be added allowing States to use funds under this part to prevent a delay in the provision of services.

Discussion: It is clear from the statute and the legislative history of the Act that successful implementation of a statewide system is dependent upon (1) the coordinated use of funds from a variety of Federal, State, and other sources, and (2) the measures taken to ensure that agencies will not reduce the amount of funds that they had been spending for services to this target population, because of the enactment of Part H. Thus, several provisions in the Act are directed toward ensuring that these two funding issues are appropriately addressed. The Secretary agrees with commenters on the need for more guidance on the payor of last resort provision, including specification of the kinds of services that may be covered and those that are not covered. Further, the Secretary believes that the statutory provisions requiring the lead agency to ensure that services are provided in a timely manner, pending the resolution of disputes among public agencies or service providers, and to have a procedure for securing the timely reimbursement of funds should be included in the regulations.

New legislation containing a specific provision relating to other early intervention funding sources (i.e., the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360)) will affect this provision.

Change: The section in the NPRM on "Timely reimbursement; nonsubstitution" has been reorganized and renamed, as follows: The section, now titled "Payor of last resort," includes (1) revised provisions on nonsubstitution of funds and non-reduction of benefits, and (2) a new paragraph on "Interim payments; reimbursement." That paragraph specifies the kinds of services covered under the payor of last resort provision.

A note has been added that describes (1) congressional intent regarding the payor of last resort provision, as evidenced by the Report of the House of Representatives on Pub. L. 99–457, and (2) a provision in the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360) that addresses the use of Medicaid funds for covered services furnished to an infant or toddler with handicaps under an IFSP. A reference to § 303.527 has been added to § 303.3, which addresses activities that can be supported with Part H funds, to reinforce the "payor of last resort" limitation.

Two new sections have been added related to the "Payor of last resort" provision: § 303.525 (Delivery of services in a timely manner) and § 303.528 (Reimbursement procedure).

Data collection (§ 303.540)

Comment: A number of commenters requested that the data collection requirements in the final regulations be more specific. Several commenters stated that a requirement should be added regarding the collection of information on the location in which early intervention services are delivered.

Discussion: The Secretary believes that § 303.540, which requires the lead agency to provide data required under section 618 and section 676(b)(4) of the Act and such other information as the Secretary may require, provides sufficient authority for the Secretary to collect information on the location of services. However, he believes that the most appropriate place for providing detailed information and guidance about the data requirements under this part would be in the reporting forms and instructions, and not in these final regulations.

Change: No change has been made in response to the comments. A technical change has been made by cross referencing the requirements in section 676(b)(4) of the Act instead of listing them in the regulations.

Subpart G—State Interagency Coordinating Council

Establishment of Council (§ 303.600)

Comment: Many commenters expressed concern about limiting the number of members on the Council to 15, and requested that the regulations permit a State to include as many members as necessary to ensure that the Council is appropriately representative.

Discussion: The number of members on a State's Council is established by statute. Section 682(a) of the Act provides that "Any State which desires to receive financial assistance under section 673 shall establish a State Interagency Coordinating Council composed of 15 members." Although the 15 member requirement cannot be changed, the Secretary believes that guidance should be provided regarding how States could broaden participation.

Change: A note has been added following § 303.600 that includes suggestions that States might use to provide broader participation, while meeting the 15 member Council requirement.

Composition (§ 303.601)

Comment: A number of commenters requested changes in this section. One commenter asked that the personnel preparation representative on the Council have expertise in early intervention. Some commenters requested that advocacy associations be represented. Other commenters asked that a note be added stating that "parent representatives should not be employees of early intervention agencies to prevent conflict of interest." Several commenters asked that a note be added which suggests that persons representing State agencies should have sufficient authority to make decisions for their agencies.

Discussion: The Secretary agrees with commenters that the personnel preparation representative on the Council should have expertise in early intervention. The Secretary also agrees that (1) parent representative should not be employees of agencies providing early intervention services, in order to prevent a conflict of interest, and (2) the Council representatives from key State agencies should have the authority to effectively represent their agencies.

Change: A note has been added to § 303.601 that provides guidance regarding the composition of the Council, the expertise which should be required of Council members representing personnel preparation, and the authority to be expected of State agency representatives. A note has been added to § 303.600 concerning conflicts of interest specific to parent representation.

Use of funds by the Council (§ 303.602)

Comment: A commenter asked that the final regulations provide that Council members who are parents be permitted to receive "necessary expenses and reimbursements, including public transportation costs, mileage, parking, tolls, and child care expenses." Other commenters stated that parents should receive compensation for participating in Council activities, since they are not paid for their participation from other sources.

Discussion: The Secretary believes that all Council members should be reimbursed for appropriate expenses incurred in the performance of their Council duties. However, he believes that, in general, Council members should serve without compensation from funds available under this part, except under special circumstances (i.e., if a member is not employed, or must forfeit wages in order to perform Council functions).

Change: A new section on "Use of funds by the Council" has been added (see § 303.602). The section includes (1) the provision from section 682(d) of the Act regarding the use of funds for employing staff and consultants, and (2) a new paragraph regarding "Compensation and expenses of Council members."

Meetings (§ 303.603)

Comment: Commenters recommended changes that would make Council meetings more accessible to the general public, including (1) deleting the phrase "to the extent appropriate" that was in the NPRM, and (2) requiring that adequate notice be provided to the public before a Council meeting.

Discussion: The term "to the extent appropriate" is included in section 682(c) of the Act. However, the Secretary believes that there should be few, if any, instances in which it would not be appropriate to have meetings open and fully accessible to the public. Therefore, the Secretary believes that the regulations should address the concerns of commenters related to making the meetings accessible.

Change: Section 303.603 has been expanded to clarify the requirements for public access to Council meetings.

Functions of the Council (§§ 303.650 through 303.653)

Comment: Several commenters requested that a note be added reflecting congressional intent that the Council play a central role in accomplishing the goal of a statewide system of early intervention services. Some commenters recommended that the regulations specify that the Council's role is more active than that of advising and assisting the lead agency.

Discussion: The legislative history of the Act makes it clear that the Congress intended for the Council to play an important role in the implementation of a State's early intervention program. The Secretary believes that the Council's role is critical to achieving the full participation and cooperation of all appropriate agencies in the State and to carrying out on-going planning and oversight regarding the State's early intervention program.

Change: Additional information has been added under a new subheading ("Functions of the Council") to describe more fully the various responsibilities of the Council. (See §§ 303.650 through 303.653.)

Comment: Some commenters requested that the planning activities and functions of the Council be expanded to include children aged three through five years. One of the commenters suggested that this could be accomplished by using some of the funds under the Preschool Grants program (Section 619 of the Act) to support the functions of the Council.

Discussion: The Council can be assigned additional functions beyond the scope of its responsibilities under this part, so long as those functions (1) are supported by funds from other programs, and (2) do not interfere with the Council's ability to carry out its obligations under this part. If a State chooses to have the Council carry out additional functions, it must make sure that appropriate financial records are maintained.

Change: None.

Note.—This appendix will not appear in the Code of Federal Regulations.

APPENDIX B—REDESIGNATION TABLE

(This appendix shows sections of the Notice of Proposed Regulations and comparable sections of the Final Regulations.)

Part 303—Early Intervention Program for Infants and Toddlers with Handicaps

Subpart A—General

PURPOSE, ELIGIBILITY, AND OTHER GENERAL PROVISIONS

Old sec	Title	New sec
303.1	Purpose of the early intervention program for infants and toddlers with handicaps.	303.1
303.2	Eligible applicants for an award.	303.2
303.3	Activities that may be supported under this part.	303.3
303.4	Applicable regulations	303.4
	Definitions	
303.5	Act	303.5
303.6	Case Management	303.6
303.7	Children	303.7
303.8	Council	303.8
	Days	303.9
303.9	Developmental Delay	303.10
	Early intervention program.	303.11
303.10	Early intervention services.	303.12
303.11	Health services	303.13
303.12	IFSP	303.14
	Include, including	303.15
303.13	Infants and toddlers with handicaps.	303.16

Purpose, Eligibility, and Other General Provisions—Continued

Old sec.	Title	New sec.
	Multidisciplinary	303.17
	Parent	303.18
	Policies	303.19
	Public agency	303.20
	Qualified	303.21
	State	303.22
	Transportation	303.23
303.15	EDGAR definitions that apply.	303.24

Subpart B—State Application for a Grant

Old sec.	Title	New sec.
	General Requirements	
303.20	Conditions of assistance.	303.100
303.22	How the Secretary disapproves a State's application or statement of assurances.	303.101
	Public Participation	
303.21(a)(1)	General requirements and timelines for public participation.	303.110
303.21(b)(2)	Notice of public hearings and opportunity to comment.	303.111
303.21(a)(1)	Public hearings	303.112
303.36(a)	Reviewing and reporting on public comments received.	303.113
	Statement of Assurances	
303.23	General	303.120
303.24	Reports and records	303.121
303.25	Control of funds and property.	303.122
303.26	Prohibition against commingling.	303.123
303.27	Prohibition against supplanting.	303.124
303.28	Fiscal control	303.125
303.29	Payor of last resort	303.126
303.30	Assurance regarding expenditure of funds.	303.127
	General Requirements for a State Application	
303.31	General	303.140
303.32	Information about the Council.	303.141
303.33	Designation of lead agency.	303.142
303.34	Assurance regarding use of funds.	303.143
303.35	Description of use of funds.	303.144
303.36(a)	Information about public participation.	303.145
303.37	Equitable distribution of resources.	303.146
	Specific Application Requirements for Years One Through Five and Thereafter	
303.38	Application requirements for first and and second years.	303.147
303.39	Third year applications	303.148
303.40	Waiver of the policy adoption requirement for the third year.	303.149
303.41	Fourth year applications.	303.150
303.42	States with mandates as of September 1, 1986 to serve children with handicaps from birth.	303.151
303.43	Applications for year five and each year thereafter.	303.152
	Application Requirements for Years Four, Five and Thereafter Related to Components of a Statewide System	
303.60	State definition of developmental delay.	303.160
303.61	Central directory	303.161
303.62	Timetables for serving all eligible children.	303.162
303.63	Public awareness program.	303.163
303.64	Comprehensive child find system.	303.164
303.65	Evaluation, assessment, and non-discriminatory procedures.	303.165
303.66	Individualized family service plans.	303.166
303.71	Comprehensive system of personnel development (CSPD).	303.167
303.72	Personnel standards	303.168
303.73	Procedural safeguards	303.169
303.83(b)(1)	Supervision and monitoring of programs.	303.170
303.83(b)	Lead agency procedures for resolving complaints.	303.171
303.85(a)	Policies and procedures related to financial matters.	303.172
303.85(b)	Interagency agreements; resolution of individual disputes.	303.173
303.84	Policy for contracting or otherwise arranging for services.	303.174
303.86	Data collection	303.175
	Participation by the Secretary of the Interior	
303.44	Eligibility of the Secretary of the Interior for assistance.	303.180

Subpart C—Procedures for Making Grants to States

Old sec.	Title	New sec.
303.50	Formula for State allocations.	303.200
303.51	Distribution of allotments from non-participating States.	303.201
303.52	Minimum grant that a State may receive.	303.202
303.53	Payments to the Secretary of the Interior.	303.203
303.54	Payments to the jurisdictions.	303.204

Subpart D—Program and Service Components of a Statewide System of Early Intervention Services

Old sec.	Title	New sec.
	General	
303.60	State definition of developmental delay.	303.300
303.61	Central directory	303.301
303.62	Timetables for serving eligible children.	303.302
	Identification and Evaluation	
303.63	Public awareness program.	303.320
303.64	Comprehensive child find system.	303.321
303.65	Evaluation and assessment.	303.322
	Nondiscriminatory procedures.	303.323
	Individualized Family Service Plans (IFSPs)	
303.66(a)	General	303.340
303.66(c)(d)	Meeting the IFSP requirements for years four and five.	303.341
303.68(a)	Procedures for IFSP development, review, and evaluation.	303.342
303.68(b)	Participants in IFSP meetings and periodic reviews.	303.343
303.69	Content of IFSP	303.344
303.67	Provision of services before evaluation and assessment are completed.	303.345
303.70	Responsibility and accountability.	303.346
	Personnel Training and Standards	
303.71	Comprehensive system of personnel development.	303.360
303.72	Personnel standards	303.361

Subpart E—Procedural Safeguards

Old sec.	Title	New sec.
	General	
303.73	General responsibility of lead agency for procedural safeguards.	303.400
303.75	Definitions of consent, native language, and personally identifiable information.	303.401

PURPOSE, ELIGIBILITY, AND OTHER GENERAL PROVISIONS—Continued

Old sec.	Title	New sec.
303.74	Opportunity to examine records.	303.402
303.75	Prior notice; native language.	303.403
	Parent consent	303.404
303.81	Surrogate parents	303.405
	Impartial Procedures for Resolving Individual Child Complaints	
303.76	Administrative resolution of individual child complaints by an impartial decision-maker.	303.420
303.77	Appointment of an impartial person.	303.421
	Parent rights in administrative proceedings.	303.422
303.78	Convenience of proceedings, timelines.	303.423
303.79	Civil action	303.424
303.80	Status of child during proceedings.	303.425
	Confidentiality	
303.82	Confidentiality of information.	303.460
	Subpart F—State Administration	
	General	
303.83	Lead agency establishment or designation.	303.500
303.83(b)(1)	Supervision and monitoring of programs.	303.501
	Lead Agency Procedures for Resolving Complaints	
303.83(b)(5)	Adopting complaint procedures.	303.510
303.83(b)(5)	An organization or individual may file a complaint.	303.511
	Minimum complaint procedures.	303.512
	Policies and Procedures Related to Financial Matters	
303.85(a)	Policies related to payment for services.	303.520
	Fees	303.521
303.83(b)(2)	Identification and coordination of resources.	303.523
303.83(b)(4)	Interagency agreements.	303.523
303.83(b)(6)	Resolution of disputes	303.524
303.83(b)(5)	Delivery of services in a timely manner.	303.525
303.84	Policy for contracting or otherwise arranging for services.	303.526
303.85	Payor of last resort	303.527
303.85(a)	Reimbursement procedure.	303.528
	Reporting Requirements	
303.86	Data collection	303.540
	Use of Funds for State Administration	
	Use of funds by the lead agency.	303.560
	Subpart G—State Interagency Coordinating Council	
	General	
303.90	Establishment of Council.	303.600
303.91	Composition	303.601
	Use of funds by the Council.	303.602
303.92	Meetings	303.603
303.94	Conflict of interest	303.604
	Functions of the Council	
303.93	General	303.650
303.93(a)	Advising and assisting the lead agency in its administrative duties.	303.651
303.93(b)	Applications	303.652
303.93(c)	Annual report to the Secretary.	303.653
	Existing Councils	
303.95	Use of existing councils.	303.670

[FR Doc. 89-14858 Filed 6-21-89; 8:45 am]

BILLING CODE 4000-01-M

APPENDIX F: Federal Regulations Implementing Part B of the Education of the Handicapped Act

§ 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 300.504(a) (1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. 1416(b)(2))

Comment. Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 300.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1414(b)(2))

§ 300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(Authority: 20 U.S.C. 1415(d))

§ 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under § 300.510 or § 300.511.

(Authority: 20 U.S.C. 1415(c))

§ 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 300.512.

(Authority: 20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975))

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.508, relating to hearings, also apply.

§ 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 300.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(Authority: 20 U.S.C. 1415)

§ 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415)

CONFIDENTIALITY OF INFORMATION

§ 300.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 300.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercis-

ing the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.570 Hearing procedures.

A hearing held under § 300.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Comment. Under § 300.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b).

§ 300.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 300.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

§ 300.576 Department.

If the Department or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Secretary shall apply the requirements of 5 U.S.C. section 552a (b) (1)-(2), (4)-(11); (c); (d); (e)(1); (2); (3)(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

APPENDIX G: Federal Regulations Implementing the Family Educational Rights and Privacy Act

DEPARTMENT OF EDUCATION

34 CFR Part 99

Family Educational Rights and Privacy

AGENCY: Department of Education

ACTION: Final regulations

SUMMARY: The Secretary revises and renames the Department of Education regulations formerly titled the Privacy Rights of Parents and Students. These regulations are retitled Family Educational Rights and Privacy and eliminate some of the regulatory requirements placed on educational agencies and institutions. The regulations have also been rewritten for clarity.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Ellen Campbell or Connie Moore, Family Policy and Regulations Office, Office of Management, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 3021, Federal Office Building No. 6), Washington, DC 20202. Telephone: (202) 732-2057.

SUPPLEMENTARY INFORMATION: Under Executive Order 12291, the Department of Education regularly reviews its regulations to determine whether the Department can decrease burdens on the public and otherwise simplify and clarify existing regulations. As part of this process, the Department has reviewed the regulations implementing the Family Educational Rights and Privacy Act (FERPA).

The FERPA regulations of the former Department of Health, Education, and Welfare (HEW) (45 CFR Part 99) were transferred to the Department of Education (ED) and recodified in Part 99 of Title 34 of the Code of Federal Regulations on May 9, 1980 (45 FR 30802). These regulations implement FERPA, which was enacted as section 438 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232g).

The FERPA sets out requirements designed to afford parents and students privacy and other rights with respect to education records. The statute applies to educational agencies and institutions that receive funds under an applicable program administered by ED. For purposes of FERPA an applicable program is a program that was either formerly administered by the Commissioner of Education prior to the establishment of ED on May 4, 1980 or any program that came into existence after ED was established, unless the law creating the new program has the effect of making FERPA inapplicable.

Educational agencies and institutions to which FERPA applies must maintain education records consistent with the requirements of FERPA. In brief, FERPA requires those agencies or institutions to provide parents and eligible students access to records directly related to the students; to permit parents and eligible students to challenge those records on the grounds that they are inaccurate, misleading, or otherwise in violation of the student's privacy or other rights; to obtain the written consent of parents and eligible students before releasing personally identifiable information about the students contained in education records to other than organizations or individuals described in statutory exceptions; and to notify parents and eligible students of these rights.

On June 10, 1987, the Secretary published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (52 FR 22250). The NPRM included a discussion of the numerous revisions and invited public comment. The revisions are intended to simplify and clarify the regulations and not to alter any interpretation under existing regulations.

In response to the Secretary's invitation in the NPRM, educational associations, organizations, universities, and individuals submitted 20 letters, which contained a total of 113 comments. More than half of the letters were from institutions of higher education and were transmitted through an organization representing the higher education community. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix to these final regulations.

Executive Order 12606

The Secretary has reviewed these regulations in accordance with Executive Order 12606, "The Family." The regulations was assessed in light of the criteria set forth in the Executive Order to determine whether they have any potential negative impact on the family. They were found to have no negative impact. In fact, the regulations will strengthen the autonomy, stability, and rights of the family unit.

The criterion of the Order which is most applicable to these regulations asks: "Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?" The statute and the implementing regulations strengthen the rights of parents by reaffirming their basic right to have access to the education records of their children, their right to be assured of the privacy of their children's records, and their right to challenge records believed to be inaccurate, misleading, or otherwise in violation of the student's privacy.

Another criterion which is applicable to these regulations asks: "Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?" Overall, these regulations are found to strengthen the stability of the family. In particular, the FERPA provisions which afford parents the right to have access to and some control over the education records of their children serve to encourage parents to be involved in the education of their children. Furthermore by affording both parents (whether custodial or non-custodial) the right to have access to the records, the regulations serve to encourage joint parental involvement in their children's education.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education department, Family educational rights, Privacy, Parents, Reporting and recordkeeping requirements, Students.

(Catalog of Federal Domestic Assistance number does not apply.)

Dated February 19, 1988.

William J. Bennett,

Secretary of Education.

The Secretary revises Part 99 of Title 34 of the Code of Federal Regulations to read as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

Subpart A—General

Sec.

99.1 To which educational agencies or institutions do these regulations apply?
99.2 What is the purpose of these regulations?
99.3 What definitions apply to these regulations?
99.4 What are the rights of parents?
99.5 What are the rights of eligible students?
99.6 What information must an educational agency's or institution's policy contain?
99.7 What must an educational agency or institution include in its annual notification?

Subpart B—What are the Rights of Inspection and Review of Education Records?

99.10 What rights exist for a parent or eligible student to inspect and review education records?
99.11 May an educational agency or institution charge a fee for copies of education records?
99.12 What limitations exist on the right to inspect and review records?

Subpart C—What are the Procedures for Amending Education Records?

99.20 How can a parent or eligible student request amendment of the student's education records?
99.21 Under what conditions does a parent or eligible student have the right to a hearing?
99.22 What minimum requirements exist for the conduct of a hearing?

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?
99.31 Under what conditions is prior consent not required to disclose information?
99.32 What recordkeeping requirements exist concerning requests and disclosures?
99.33 What limitations apply to the redisclosure of information?
99.34 What conditions apply to disclosure of information to other educational agencies or institutions?
99.35 What conditions apply to disclosure of information for Federal or State program purposes?
99.36 What conditions apply to disclosure of information in health and safety emergencies?
99.37 What conditions apply to disclosing directory information?

Subpart E—What are the Enforcement Procedures?

99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?
99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?
99.62 What information must an educational agency or institution submit to the Office?
99.63 Where are complaints filed?
99.64 What is the complaint procedure?
99.65 What is the content of the notice of complaint issued by the Office?
99.66 What are the responsibilities of the Office in the enforcement process?
99.67 How does the Secretary enforce decisions?

Authority: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g), unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) This part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary of Education that—

(1)(i) Was transferred to the Department under the Department of Education Organization Act (DEOA); and

(ii) Was administered by the Commissioner of Education on the day before the effective date of the DEOA; or

(2) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 438 of the General Education Provisions Act inapplicable.

(Authority: 20 U.S.C. 1230, 1232g, 3487, 3507)

(b) The following chart lists the funded programs to which Part 99 does not apply as of April 11, 1988:

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96-374) 20 U.S.C. 1070d-2).	Part 206.
2. Programs administered by the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research	The Rehabilitation Act of 1973, as amended. (29 U.S.C. 700, *et seq.*).	Parts 350–359, 361, 365, 366, 369–371, 373–375, 378, 379, 385–390, and 395.
3. Transition program for refugee children	Immigration and Nationality Act, as amended by the Refugee Act of 1980, Pub. L. 96-212 (8 U.S.C. 1522(d)).	Part 538.
4. College Housing	Title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749, *et seq.*).	Part 614.
5. The following programs administered by the Assistant Secretary for Educational Research and Improvement: Educational Research Grant Program, Regional Educational Laboratories Research and Development Centers. All other research or statistical activities funded under Section 405 or 406 of the General Education Provisions Act.	Section 405 of the General Education Provisions Act (20 U.S.C. 1221e), and section 406 of the General Education Provisions Act (20 U.S.C. 1221-1).	Parts 700, 706–708.

Note: The Secretary, as appropriate, updates the information in this chart and informs the public.

(c) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(d) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV–A–1 and IV–B, respectively, of the Higher Education Act of 1965, as amended).

(e) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

(Note: 34 CFR 300.560–300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.)

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 438 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to—

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

"Directory information" means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means to permit access to or the release, transfer, or other communication of education records, or the personally indentifiable information contained in those records, to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

"Educational agency or institution" means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

"Education records" (a) The term means those records that are—

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include—

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are—

(i) Maintained separately from education records;

(ii) Maintained solely for law enforcement purposes; and

(iii) Disclosed only to law enforcement officials of the same jurisdiction;

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that—

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are—

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable information" includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

"Record" means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

"Student", except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of eligible students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

(Authority: 20 U.S.C. 1232g(d))

§ 99.6 What information must an educational agency's or institution's policy contain?

(a) Each educational agency or institution shall adopt a policy regarding how the agency or institution meets the requirements of the Act and of this part. The policy must include—

(1) How the agency or institution informs parents and students of their rights, in accord with § 99.7;

(2) How a parent or eligible student may inspect and review education records under § 99.10, including at least—

(i) The procedure the parent or eligible student must follow to inspect and review the records;

(ii) With an understanding that it may not deny access to education records, a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of those records;

(iii) A schedule of fees (if any) to be charged for copies; and

(iv) A list of the types and locations of education records maintained by the agency or institution, and the titles and addresses of the officials responsible for the records;

(3) A statement that personally identifiable information will not be released from an education record without the prior written consent of the parent or eligible student, except under one or more of the conditions described in § 99.31;

(4) A statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information under § 99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest;

(5) A statement that a record of disclosures will be maintained as required by § 99.32, and that a parent or eligible student may inspect and review that record;

(6) A specification of the types of personally identifiable information the agency or institution has designated as directory information under § 99.37; and

(7) A statement that the agency or institution permits a parent or eligible student to request correction of the student's education records under § 99.20, to obtain a hearing under § 99.21(a), and to add a statement to the record under § 99.21(b)(2).

(b) The educational agency or institution shall state the policy in writing and make a copy of it available on request to a parent or eligible student.

(Authority: 20 U.S.C. 1232g(e) and (f))

(Approved by the Office of Management and Budget under control number 1880–0508)

§ 99.7 What must an educational agency or institution include in its annual notification?

(a) Each educational agency or institution shall annually notify parents of students currently in attendance, and eligible students currently in attendance, at the agency or institution of their rights under the Act and this part. The notice must include a statement that the parent or eligible student has a right to—

(1) Inspect and review the student's education records;

(2) Request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;

(3) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and the regulations in this part authorize disclosure without consent;

(4) File with the U.S. Department of Education a complaint under § 99.64 concerning alleged failures by the agency or institution to comply with the requirements of the act and this part; and

(5) Obtain a copy of the policy adopted under § 99.6.

(b) The notice provided under paragraph (a) of this section must also indicate the places where copies of the policy adopted under § 99.6 are located.

(c) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents and eligible students of their rights.

(d) An agency or institution of elementary or secondary education shall effectively notify parents of students who have a primary or home language other than English.

(Authority: 20 U.S.C. 1232g(e))

(Approved by the Office of Management and Budget under control number 1880–0508)

Subpart B—What are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student.

(b) The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request.

(c) The educational agency or institution shall respond to reasonable requests for explanations and interpretations of the records.

(d) The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records.

(e) The educational agency or institution shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect, review, or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are—

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if—

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's—

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if—

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall—

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

Subpart C—What are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights, he or she may ask the educational agency or institution to amend the record.

(b) The education agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) if the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy or other rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall—

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall—

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?

(a) Except as provided in § 99.31, an educational agency or institution shall obtain a signed and dated written consent of a parent or an eligible student before it discloses pesonally identifiable information from the student's education records.

(b) The written consent must—

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section—

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provided the student with a copy of the records disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorize representatives of—

(i) The Comptroller General of the United States;

(ii) The Secretary; or

(iii) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to—

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities, if a State statute adopted before November 19, 1974, specifically requires disclosures to those officials and authorities.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type or State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to—

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information" under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(b) This section does not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student to any parties under paragraphs (a) (1) through (11) of this section.

(Authority: 20 U.S.C. 1232g (a)(5)(A), (b)(1) and (b)(2)(B))

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include—

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include—

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of

auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to—

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student; or

(4) A party seeking directory information.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

(Approved by the Office of Management and Budget under control number 1880–0508)

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures of directory information under § 99.31(a)(11) or to disclosures to a parent or student under § 99.31(a)(12).

(d) Except for disclosures under § 99.31(a) (11) and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall—

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless—

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The policy of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if—

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if—

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health of safety or the student or other individuals.

(b) Paragraph (a) of this section shall be strictly construed.

(Authority: 20 U.S.C. 1232g(b)(1)(I))

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of—

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

Subpart E—What are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?

(a) For the purposes of this subpart, "Office" means the Family Policy and Regulations Office, U.S. Department of Education.

(b) The Secretary designates the Office to—

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Education Appeal Board to act as the Review Board required under the Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the

Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

§ 99.63 Where are complaints filed?

A person may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy and Regulations Office, U.S. Department of Education, Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(Authority: 20 U.S.C. 1232g(f))

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) If the Office receives a complaint, it notifies the complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(b) The notice to the agency or institution under paragraph (a) of this section—

(1) Includes the substance of the alleged violation; and

(2) Informs the agency or institution that the Office will investigate the complaint and that the educational agency or institution may submit a written response to the complaint.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section—

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If the eductional agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take an action authorized under 34 CFR Part 78, including—

(1) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(2) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b) or 298.45(b), depending upon the applicable program under which the notice is issued; or

(3) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complianant and the agency or institution written notice of the decision and the basis for the decision.

(Note: 34 CFR Part 78 contains the regulations of the Education Appeal Board.)

(Authority: 20 U.S.C. 1232g(g))

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix—Analysis of Comments and Changes

The following is an analysis of comments and changes in the regulations since publication of the NPRM. Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes are not addressed.

Two issues were raised that cannot be addressed under any specific section of the regulations. In one case commenters raised the issue in the context of different sections of the regulations; in the other case the issues concerned a section that was removed from the regulations. The following is a discussion of those two issues:

- Release of records from another agency or institution.

Comment: Several commenters believed an agency or institution should not be required to provide a student a copy of a transcript or other records from another agency or institution unless the originating agency or insitution is no longer in existence. Other commenters believed language should be included that would permit an educational agency or institution to decline a request for disclosure of a student's transcript or other records from another agency or institution, unless the originating agency or institution is no longer in existence.

Discussion: The records in question fall within the definition of education records in that they are directly related to a student and are maintained by an educational agency or institution. An agency or institution is required to provide a parent or an eligible student access to all records, including those transcripts and records it did not originate but that it maintains. This requirement is set forth in the section entitled, "What rights exist for a parent or eligible student to inspect and review education records?" The FERPA does not forbid or require an agency or institution to disclose records to a third party, nor would it prevent an agency or institution from establishing a policy of not disclosing to third parties records that had originated at another agency or instituion.

Change: None.

- *Waiver of Rights.*

Comment: One commenter expressed concern about the removal of the section which set forth the conditions under which a parent or a student could waive any or all of his or her rights under the Act. While not endorsing nonstatutory waivers, the commenter believed that if nonstatutory waivers will continue to be recognized, the conditions governing those waivers are necessary in order to protect against any possible abuse. A second commenter supported the deletion of the general waiver provision, stating that there is no authority for waivers beyond the very narrow ones set forth in the statute.

Discussion: There was no statutory requirement for the waiver provision that was included in the regulations or the conditions under which nonstatutory waivers could be permitted. Therefore, the section was removed. However, in removing it, the Secretary does not intend to preclude educational agencies and institutions from establishing policies and conditions under which parents or students would be allowed to execute nonstatutory waivers.

Change: None.

The Secretary's discussion of the other comments received on the NPRM follows:

Section 99.1 To which educational agencies or institutions do these regulations apply?

Comment: One commenter questioned the specific legislative authority exempting programs from this part and the effect of exempting the programs.

Discussion: The statute appears in Part C of the General Education Provisions Act (GEPA). Prior to the establishment of the Department, Part C applied only to programs administered by the Commissioner of Education. The Commissioner had no authority over programs administered by the Assistant Secretary of Education and the Director of the National Institute of Education. For programs that were transferred to the Department under the Department of Education Organization Act (DEOA), the provisions of Part C continued to apply only to those programs administered by the Commissioner on the day preceding the effective date of the DEOA. Thus, FERPA does not apply to former National Institute of Education programs and the former National Center for Educational Statistics, Rehabilitation Services, National Institute of Disability and Rehabilitation Research, College Housing, and the Transition Program for Refugee Children.

Change: None.

Section 99.3 What definitions apply to these regulations?

Definition of "Directory Information".

Comment: Several commenters objected to the standard proposed in the definition of "directory information," stating there is no authority to broaden the term to include other information beyond that identified by Congress. Others stated that what may be considered an invasion of privacy by one person may not be so considered by another, which could result in inconsistency.

In contrast, an equal number of commenters stated that the standard is "most helpful," a "notable improvement" and "should be incorporated in the regulations." One commenter asked that distinguished academic performance or public service be included.

One commenter asked how the standard was developed. Others seemed to believe the standard would replace the items that have been designated by statute.

Discussion: The statute states that "'directory information' relating to a student includes the following * * *" and then lists items which may be considered directory information. The Department had interpreted the word "includes" to mean the list was not prescriptive. To clarify that interpretation, the phrase "* * * and other similar information" was added to the definition in the regulations published in 1976.

The Secretary, in revising the regulations, decided it would be preferable to establish a standard for interpreting the scope of the legislation. The standard, together with the list of items, should provide sufficient guidance for educational agencies and institutions. The standard would permit an agency or institution to mention distinguished academic performance or public service as long as it had designated that information as directory information and the parent or student had not objected to such a disclosure.

Change: None.

Section 99.3 Definition of "Education Records".

Comment: A commenter believed the regulations are unclear on whether the definition of education records includes or excludes records relating to an individual in attendance at an educational agency or institution who is also employed as a result of his or her status as a "student."

Discussion: All records relating to a student who is also an employee of an educational agency or institution are included in the definition of education records if the student's employment is contingent on the fact that he or she is a student. For example, all records, including employment records, of a student enrolled in a work-study program are education records; likewise, all records of a student who, because he or she is a student, is employed by the educational agency or institution to serve as a teaching assistant, lecturer, or in some other capacity, are education records. Excluded from the definition of education records are the employment records of an employee—including, for example, a teaching assistant or lecturer—whose employment did not result from and does not depend on the fact that he or she may also be a student at the agency or institution, provided that these employment records are made and maintained in the normal course of business, relate exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose.

Change: The definition has been rewritten for clarity.

Comment: One commenter believed that personally identifiable information relating to events or matters that transpire after the student is no longer in attendance should be covered by the definition of education records. The commenter was concerned that the exclusion of this information from the definition is without statutory authority, that it would allow an educational agency or institution to collect negative allegations or information on a former student, and that the parent or student would have no protection against release of the information to third parties.

Discussion: The exclusion is intended to allow educational agencies and institutions and their alumni organizations to perform their traditional functions of fund-raising and publishing information concerning the accomplishments of alumni. Most, if not all, alumni organizations perform these functions in contact with the former students. Since the collection and use of negative information about alumni is not an accepted or usual practice of educational agencies or institutions, the Secretary has decided that any expectation of abuse is minimal and would be insufficient to justify imposing an additional regulatory burden.

Change: None.

Section 99.3 Definition of "Parent".

Comment: One commenter believed the definition of "parent" should specifically state that a school district must provide rights to both natural parents, custodial and noncustodial. Another commenter believed that the new section "What are the rights of parents?" should specifically state that "noncustodial" parents are included in the Act's coverage. The commenters believed the proposed additions would further clarify the rights of noncustodial parents.

Discussion: In revising the regulations, the Secretary recognized the need to clarify the rights of custodial and noncustodial parents. Therefore, the new section was added to state specifically that the agency or institution shall give full rights under the law to either parent unless the agency or institution has been provided with evidence that there is a court order, State statue, or legally binding document relating to such matters as divorce, separation, or custody, that specifically revokes these rights. The Secretary believes this new section provides sufficient clarification and that the definition of "parent" should remain as it appeared in the proposed regulations.

Change: None.

Section 99.3 Definition of "Student".

Comment: One commenter stated that the inclusion of "former student" in the definition of "student" improves the definition. Two other commenters appeared to believe that the purpose of the revision was to extend the law's coverage to include former students.

Discussion: Former students are covered under the statute's definition of student and have been entitled to the same rights as students in attendance since the law's passage. The intent of the revision is to make this clear in the definition section of the regulations. Those specific provisions of the regulations where rights are limited to current students are clearly stated in the revised regulations. See § 99.7 regarding annual notification, § 99.34 regarding disclosure to other educational agencies and institutions and § 99.37 regarding directory information.

Change: None.

Section 99.5 What are the rights of eligible students?

Comment: Two commenters believed the paragraph that was removed from this section, which is entitled "Student Rights" in the current regulations, should be reinserted. The paragraph stated that the rights of an eligible student are not affected by a provision in the regulations that allows an agency or institution to disclose information to the parents of such a student without the student's written consent. One of these commenters believed the reference should be reinserted in order to make clear the fact that the student's right to have access to his or her education records is not affected by the student's status as a dependent. The other commenter believed the removal of the reference may result in increased pressure on institutions to grant a parent's request for access without formally establishing that the student is in fact a dependent as defined in section 152 of the Internal Revenue Code.

Discussion: This section of the regulations clearly states that when a student becomes an eligible student, all of the FERPA rights transfer from the parents to the student. The section of the regulations entitled "Under what conditions is prior consent not required to disclose information?" provides that an agency or institution may disclose information to the parents of a dependent student without the student's consent; the provision does not require the school to do so. The paragraph that is being removed was not intended to have any effect on an agency's or institution's decision on whether to grant the parent's request for information. Nor was it intended to affect an agency's or institution's policies in establishing that a student is a dependent as defined in section 152 of the Internal Revenue Code.

Change: None.

Comment: Three commenters believed educational agenices and institutions should be required to allow the parents of dependent students to inspect and review the education records of the student. Another commenter believed that even allowing educational agencies and institutions to afford the parents the opportunity to have access undermined the intent of the law by removing the student's right to have control over the disclosure. This commenter believed that specific procedures for release of information to parents in specific circumstances were needed.

Discussion: The statute clearly provides that the parents' rights afforded by the law transfer to the student when the student reaches age 18 or is attending an institution of postsecondary education. The statute also clearly provides that an educational agency may disclose the education records of a dependent student to the parents of the student without the student's consent. The Secretary has no authority to change these statutory provisions. He finds nothing in the statute to indicate that Congress intended the Department to develop procedures such as the one commenter suggested and believes that to do so would impose an unnecessary regulatory burden.

Change: None.

Comment: A commenter believed the regulations should clarify the status of handicapped students over the age of 18 whose handicapping condition is such as to affect their ability to understand and/or exercise their rights under the Act.

Discussion: The Secretary has carefully considered this question in light of the fact that at age 18 the rights transfer from the parent to the student. He has decided that a student who is so severely handicapped as to prevent the student from exercising his or her rights under the Act would in most cases be under the legal care or guardianship of another person or entity. In the absence of a court's order of guardianship, the Secretary believes it would be reasonable to presume that the parents of such a student are the persons who are in the best position to act on behalf of the student. Therefore, the Secretary has decided that no specific provision in the regulations is necessary.

Change: None.

Comment: One commenter was concerned about the statement in the proposed regulations that provides that an individual does not have rights in components of an "agency or institution at which the individual has never been in attendance." The commenter questioned whether a student who is enrolled in one component of a university and takes one course in another component is considered to be a student in attendance at, and with rights in, both components. The commenter believed the provision could result in the disclosure of records by a component of the institution in which the student has never been in attendance.

Discussion: In revising the regulations, two significant phrases were unintentionally omitted from the statement. The statement should have read, "If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission but has never been in attendance." Concerning the commenter's specific question, if an individual applied for but was not admitted to a component, the individual would have no rights with regard to his or her application for admission to that component. This result is consistent with extensive legislative history on the subject. However, if an individual took a course in the component to which he or she had been denied admission, that individual would have FERPA rights with respect to that course, but still would not have rights with respect to the denied application for admission to that component.

Change: The phrases "is or has been in attendance at" and "to which the individual has applied for admission" have been added.

Comment: A commenter was concerned that an institution might misinterpret the language in this provision to mean that a student would not have rights with respect to records which happen to be maintained in a component other than the component in which the student is enrolled.

Discussion: A student cannot be denied access or other rights with respect to his or her education records, regardless of location.

Change: None.

Comment: A commenter suggested that the words "his or her parent" in this section be changed to "the parents" and the words "parents of students" be changed to "parents."

Discussion: In revising the regulations, the Secretary changed the definition of "parent" to eliminate the need to refer to "the parent of the student" or "his or her parent" throughout the regulations. The need for changing the terminology in this section was overlooked.

Change: The terminology has been revised to read "parents."

Section 99.6 What information must an educational agency's or institution's policy contain?

Comment: One commenter believed an educational agency or institution should be required to include in its policy a statement that grades may not be appealed.

Discussion: The legislative history of FERPA indicates that the Act was not intended to be used to replace previously established procedures to appeal the grade given the student's performance in a course. However, given the discretion delegated to educational agencies or institutions in implementing FERPA, an agency or institution might choose to permit parents of students or eligible students to use FERPA procedures to challenge a grade. Therefore, the Secretary has decided that it is not necessary or appropriate to require educational agencies and institutions to state in their policies that a student's grade may not be appealed.

Change: None.

Comment: Another commenter expressed agreement with the revisions made in this section with regard to the written policy each educational agency or institution must adopt. However, the commenter seemed to believe that the regulations required an educational agency or institution to publish its policy as part of its annual notification and that this requirement was being removed in revising the regulations.

Discussion: The only revisions made in this section, which was previously numbered 99.5, were made for the purpose of clarification. Neither the current nor the revised regulations require that an educational agency or institution include its policy in the annual notification. Both regulations require that the annual notification include a statement of where the policy may be obtained.

Change: None.

Section 99.7 What must an educational agency or institution include in its annual notification?

Comment: One commenter believed the intent of the law is that educational agencies and institutions be required to "make notification available" to parents or students rather than to "notify" parents or students. Therefore, the commenter suggested that the word "notify" in the first paragraph of the section be replaced by the words "make notification available."

Discussion: The statute requires educational agencies and institutions to inform the parents or the eligible students of the rights accorded them by the Act. In order to inform the parents or the eligible students of their rights, educational agencies and institutions would be required to notify, not simply make notification available.

Change: None.

Comment: One commenter pointed out that the revised regulations would require educational agencies and institutions to notify parents of students in attendance "and" eligible students in attendance whereas the former regulations required that parents "or" students be notified.

Discussion: The use of the word "or" can connote the idea that an educational agency or institution has an option either to notify parents of all students—whether the students are eligible or not—or to notify only eligible students. Conversely, use of "and" could be construed to require disclosure to eligible students and all parents, whether or not they were the parents of noneligible students. The word "and" is used in this section with the understanding that in the phrase "parents and eligible students" the word "parents" means the parents of students who are not eligible students. Thus, the requirements in question apply both to eligible students and to parents of students who are not eligible students.

Change: None.

Comment: One commenter, writing on behalf of an institution of higher education, believed language should be inserted to relieve notification requirements with respect to parents who reside outside the continental United States. The commenter also believed agencies and institutions should not be required to notify parents of students who have a primary or home language other than English if the student has demonstrated the minimal command of the English language required for admission to the institution.

Discussion: The statute requires that educational agencies or institutions inform the parents or students of their rights. It does not, however, require that the parents or students be notified individually; a general notification, such as by publication in a newsletter or college bulletin, is adequate. The requirement that an agency or institution notify parents of students who have a primary or home language other than English applies only to elementary and secondary schools. Institutions of higher education are not required to inform parents of rights, just eligible students.

Change: None.

Comment: One commenter asked for information on how educational agencies and institutions are to notify former students of their rights and the agency's or institution's policies.

Discussion: Both the current regulations and the revised regulations provide that notification must be given only to parents of students in attendance or eligible students in attendance. The notification of rights and policy need not be provided to former students or their parents. In any case, as noted in the discussion of the preceding comment, a general notification by publication in a newsletter or college bulletin is adequate to satisfy the statutory and regulatory requirements.

Change: None.

Section 99.10 What rights exist for a parent or eligible student to inspect and review education records?

Comment: A commenter believed there was a need to clarify the requirement that an educational agency or institution comply with a request for access to records within "a reasonable period of time, but in no case more than 45 days after it has received the request." The commenter indicated that the regulations should emphasize that it is quite often reasonable to provide access within a shorter period of time than the 45-day limit.

Discussion: The Secretary finds that, in practice, schools often provide access within a period of time which is considerably shorter than the 45-day limit. He has decided that the phrase "but in no case more than 45 days" serves to emphasize that 45 days is the maximum time allowed for compliance.

Change: None.

Comments: Two commenters were of the opinion that parents should be entitled to obtain copies of the education records of their children. Both commenters indicated that having copies of the records would provide protection against a school's losing or misplacing records. One of the commenters believed the provision would be particularly beneficial for families who move to a new location, in the event the education records are misplaced or lost in transit or in the event transfer of the records is delayed. The other commenter believed such a provision would also relieve schools of the necessity of determining when a denial of copies would effectively result in a denial of access.

Discussion: Both the current and the revised regulations set forth conditions which apply to the disclosure of information to other educational agencies and institutions in which a student seeks or intends to enroll. One of the conditions is that an agency or institution which transfers records to another agency or institution must give the parent or eligible student, upon request, a copy of the record that was disclosed. This is required by statute.

The second case in which an educational agency or institution must provide copies is when a parent or student gives a written consent for the disclosure of information from the student's education records and requests a copy of the records disclosed. This is also a statutory requirement.

The current and the revised regulations also require an educational agency or institution to provide copies of education records if a failure to do so would effectively result in a denial of access, and to include in their written policy a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of education records. These requirements, while not specifically stated in the statute, are necessary to implement the statutory requirement that an educational agency or institution shall not have a policy of denying, or effectively preventing, a parent or student the right to inspect and review the education records of the student.

The Secretary has decided that it would impose an unnecessary burden to require educational agencies or institutions to provide copies except as is now required by statute and the implementing regulations. However, nothing in the statute or the regulations would preclude an educational agency or institution from adopting a policy of providing copies in other cases, if it so chooses.

Change: None.

Comments: Two commenters believed the provision that prohibits educational agencies and institutions from destroying records if there is a pending request for access should be expanded. Both commenters believed educational agencies and institutions should be required to notify parents prior to destruction of documents and afford them an opportunity to inspect and review or obtain the records.

Discussion: The Secretary had decided that such a requirement would impose an unnecessary burden on educational agencies and institutions. In many cases, State law or agency or institutional policies and procedures prescribe a period of time in which education records are required to be maintained. Nothing in the Act or these regulations would preclude an educational agency or institution from implementing a policy of notifying parents or eligible students prior to the destruction of any education records.

Change: None.

Comments: One commenter expressed concern about the provision that accords an eligible student the right to have his or her medical treatment records reviewed by a physician or other appropriate professional of the student's choice. The commenter questioned whether postsecondary institutions would be obligated to verify the credentials of the professional chosen by the student.

Discussion: This provision is based on a requirement in the statute. The provision describes the rights of inspection and review of education records in the revised regulations. Neither the statute nor the regulations prescribe any procedures for verification.

Change: None.

Comments: One commenter believed that a provision in this section lends support to parents who claim they should have the right to have access so long as they are supporting the student in college. The provision in question reads, "* * * each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student." It is the phase "parent or eligible student" that the commenter believed lends support to the parent's claim.

Discussion: Two word "parent" in the phase "parent or eligible student" means the parent of a student who is not an eligible student. Thus, at the college level, FERPA affords the eligible student the right of inspection and review. FERPA does not, however, prohibit an educational agency or institution from disclosing the education records of an eligible student to the parents of the eligible student if the student is a dependent child as defined in section 152 of the Internal Revenue Code of 1954. The provision which allows educational agencies and institutions to disclose information to parents of eligible students is set forth in the section entitled, "Under what conditions is prior consent not required to disclose information?"

Change: None.

Section 99.11 May an educational agency or institution charge a fee for copies of education records?

Comments: One commenter believed fees for copying should be limited to the actual cost of reproduction. The commenter believed that unless fees are limited to the actual cost of copying, an educational agency or institution might incorporate into the fee costs for search and retrieval of education records. A second commenter indicated that an educational agency or institution should be allowed to charge a fee for search and retrieval, if done manually, and for any other costs incurred in providing copies.

Discussion: Educational agencies and institutions are entitled to charge reasonable fees for the actual cost of reproduction, secretarial time, and postage. The Secretary considered whether to include a provision to allow educational agencies and institutions to charge a fee for search and retrieval. He decided that providing parents or students access to education records is a function that is generally a part of the accepted and normal business of educational agencies and institutions.

Change: None.

Section 99.12 What limitations exist on the right to inspect and review records?

Comment: One commenter was concerned about the removal of the provision that required educational agencies and institutions to document the confidentiality of letters and statements of recommendation that were placed in the education records of a student prior to January 1, 1975. The commenter believed that the requirement provided the only reliable way of determining that a letter or statement was indeed "confidential."

Discussion: The provision was removed because it placed an undue burden on agencies and institutions to expect that they would be able to document the confidentiality of letters or statements that were solicited or sent and retained more than 10 years ago.

Change: None.

Comment: A commenter raised a question relating to the provision that an educational agency or institution cannot require a waiver as a condition for admission to or receipt of a service or benefit from the agency or institution. With that in mind, the commenter asked whether a placement office would be denying a service or benefit to a student by advising the student that a professor will not write a letter of recommendation or an employer will not accept a letter of recommendation, or both, unless the student signs a waiver.

Discussion: A faculty member's refusal to write a reference without a waiver would be considered an action of that individual and not of the agency or institution. A placement office would not be denying a service or benefit by advising the student of the faculty member's or employer's refusal.

Change: None.

Comment: One commenter believed the provision in this section that allows an applicant for admission to waive his or her rights under certain conditions should be removed.

Discussion: The provision is required by statute. Therefore, the Secretary has no authority to remove it from the regulations.

Change: None.

Section 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

Comments: Two commenters believed that a parent or student should have the option of inserting a statement in an education record without first going through the hearing process that is provided in this section. The commenters interpreted the statute as intending that an educational agency or institution must provide a parent or a student both an opportunity for a hearing and an opportunity to insert a statement in the record. They believed the regulations misapply the statute's intent by requiring that a parent or student go through the hearing process before exercising the right to place a statement in the record. One of the commenters stated that this requirement can result in extensive delay in cases where a parent's or student's interest in inserting a clarifying statement in the record is time-sensitive.

Discussion: The statute provides that the parents or students must be afforded "an opportunity for a hearing * * * to challenge the content of [the] records and to provide an opportunity for the correction or deletion of [data] and to insert into [the] records a written explanation * * * respecting the content of [the] records." the statute is not definitive on the question of whether the parent's or student's right to place a statement in the records exists independent of the hearing process. However, the Secretary believes that the order in which the hearing and the statement are addressed in the statute indicates that the Congressional intent was that a parent or student should exhaust the administrative remedy afforded by the hearing process before exercising the right to place an explanatory statement in the record.

After considering this issue, the Secretary has decided that to require a hearing would be burdensome in cases where an educational agency or institution and the parent or student are clearly in agreement that an explanatory statement alone is the appropriate remedy. If one or the other of the two parties disagrees, then the parents or eligible student must exhaust the remedy afforded by the hearing process before entering an explanation in the record. The Secretary finds no reason to regulate on this issue since it may be resolved by the two parties directly involved.

The Secretary has also considered whether an agency or institution could be required to allow a parent or student to insert a statement in the record if the parent or student considers the matter to be time-sensitive. There is no FERPA provision which would require an agency or institution to expedite the process in a situation where a parent or student believes time is a factor. The explanatory statement provided for in the regulations is not intended to serve any purpose other than to document the parent's or student's final position on the accuracy of an education record.

Change: None.

Comment: One commenter believed the statement that a parent or student inserts in the education record could provide an unlimited opportunity to enter a statement of disagreement. The commenter suggested that such a statement should be limited to a declaration of disagreement and that the educational agency or institution should have the right to refuse to include information beyond such a declaration.

Discussion: The statute requires that a parent or student be afforded an opportunity to insert into the records "a written explanation * * * respecting the content of [the disputed] records." The Secretary has no authority to require that the statement be limited to a declaration of disagreement.

Change: None.

Comment: One commenter suggested an amendment of the provision which requires that an educational agency or institution disclosed a parent's or a student's explanatory statement whenever it discloses the portion of the record to which the statement relates. The commenter believed that educational agencies or institutions with complex or automated recordkeeping systems should not be required to provide a copy of the explantatory statement along with a disclosed record. Instead, the commenter believed agencies or institutions should be allowed to include on the disclosed record a reference to the fact that the explanatory statement exists and will be made available on request.

Discussion: The statute requires that the statement be maintained with the record. The Secretary believes the regulatory requirement that the statement be disclosed whenever the contested record is disclosed is necessary to meet the statutory intent.

Change: None.

Section 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclosed information?

Comment: One commenter believed that it seemed inappropriate to require that a student's written consent state the purpose of the release. The commenter seemed to believe that the written consent is intended to be a mechanism to restrict what he assumes is a student's right to have information released from his or her own education records. In interpreting the provision in this way, the commenter believed that requiring the student to state the purpose of the release limited his right to have the records released.

Discussion: The statute requires that the purpose of the release be stated in the written consent; therefore, the Secretary has no authority to remove the provision. The purpose of the written consent is to document that the student consented to a disclosure of information from his or her education records; the consent is not intended in any way to restrict any of a student's rights.

Change: None.

Comment: Another commenter indicated that educational agencies and institutions should be able to accept requests by telephone with proper safeguards.

Discussion: The commenter did not specify whether he or she was referring to requests made by a third party for disclosure of information from a student's education records or a request made by a parent or eligible student to disclose information to a third party. Concerning the former, the regulations do not require that a request be in writing in order for an agency or institution to disclose information pursuant to one of the statutory exclusions permitting disclosure without consent. Concerning the latter, the statute requires an agency or institution to obtain written consent of a parent or eligible student before disclosing information to a third party.

Change: None.

Section 99.31 Under what conditions is prior consent not required to disclose information?

Comment: A commenter believed the term "legitimate educational interest" should be more definitive. The commenter indicated that some institutions interpret the term too broadly while others interpret it too narrowly.

Discussion: The Secretary believes the Department could not make a definitive statement of legitimate educational interest that would apply to each school district and college and university across the nation. Each educational agency and institution must establish its own criteria, according to its own procedures and requirements, for determining when its school officials have a legitimate educational interest in a student's records.

Change: None.

Comment: Two commenters disagreed with the proposal to add language to clarify that education records may be disclosed without consent to a postsecondary institution in which a student seeks or intends to enroll. The commenters believed the addition expanded the scope of the statute and that the statutory purpose of the provision was to facilitate the transfer of records when a student moves from one public school system to another. In the case of postsecondary institutions, the commenters believed it would be more appropriate to require consent of the parent or the student before transferring records.

Discussion: The current regulations did not clearly specify that postsecondary educational institutions are covered by the exception. The provision has been applicable in practice to postsecondary institutions since enactment of the law. The change to this provision clarifies that "schools" include institutions of postsecondary education.

Change: None.

Comment: A commenter asked that the definition of "financial aid" be explicitly broadened to include all debts owed to an institution as a result of the student's participation in the institution's programs. The commenter strongly believed that Congress did not intend that an institution should be restricted by the law from collecting any and all debts owed it by students.

Discussion: The statute was intended to provide parents or students some control over the disclosure of information from the student's education records. With certain specified exceptions, including the provision with regard to financial aid, information cannot be disclosed without a student's written consent. The statute refers to disclosure "in connection with a student's application for, or receipt of, financial aid." In that context, the definition of financial aid could not be broadened to include other debts owed the institution.

Change: None.

Comment: One commenter, a representative of a State Department of Education, believed a provision should be included to acknowledge that State law may in some cases be more protective of students' privacy than Federal law, particularly in restricting the conditions under which information can be disclosed without the parent's written consent.

Discussion: The current and revised regulations provide that a State is not prevented from further limiting the number or type of State or local officials to whom disclosures may be made without consent. The regulations also state under the section "What are the rights of eligible students?" that the law and regulations "do not prevent educational agencies or institutions from giving students rights in addition to those given to parents of students." The Secretary has decided that no regulatory purpose would be served by including a provision such as suggested by the commenter.

Change: None.

Comment: A commenter suggested a change in the provision that allows disclosure "to organizations conducting studies for, or on behalf of, educational agencies or institutions [if] the study is conducted in a manner that does not permit personal identification of parents or students by individuals other than representatives of the organization * * *." The commenter believed the word "by" should be changed to "to".

Discussion: The word "by" is used in the statute, and the Secretary believes the meaning is clear.

Change: None.

Comment: None.

Discussion: In the notice of proposed rulemaking (NPRM) for these regulations the phrase "parents or students" was used in § 99.31(a)(6)(ii)(A). However, the statute requires organizations that receive information under this exception to the consent requirement to protect the information "in such a manner as will not permit the personal identification of students and their parents * * *."

Change: The word "or" has been changed to "and" to ensure that both groups are fully protected.

Comment: A commenter believed the educational agency or institution should be relieved in some cases of the requirement of making a reasonable effort to notify a parent or student in advance of compliance with a subpoena. The commenter indicated that in legal actions to which the student is a party, the court process itself requires that any subpoena be served on the opposing party, thereby making any notification effort by the educational agency or institution superfluous.

Discussion: The statutory language requires that parents or students be notified of "all such orders or subpoenas" in advance of compliance. The language was modified in the course of promulgating the current regulations to require that the agency or institution "make a reasonable effort to notify * * *." The modification was made in recognition that it would be difficult in many cases for the agency or institution to comply with the statutory requirement and in the belief that the modification was in accord with the Congressional intent.

The Secretary has decided that he has no authority to relieve educational agencies or institutions of the statutory requirement that parents and students be notified of "all such orders or subpoenas." The Secretary has also decided that even in cases where the parent or student brings the action, the notification serves to assure that the party serving a subpoena is in fact acting on behalf of the parent or student.

Change: None.

Comment: One commenter suggested that a condition be added to allow a postsecondary institution to contact a parent of an eligible student without the student's consent if the institution suspects that the student has a physical or emotional problem of which the university believes the parent may be unaware and that affects the student's academic or campus life.

Discussion: The Secretary has no authority to regulate an exception to the statutory requirement that at age 18 the rights afforded by FERPA transfer from the parent to the student. However, if an institution determined that the circumstances of a situation were such as to constitute a health or safety emergency and if the university decided that the parent is the party who is in the best position to deal with the emergency, then the disclosure could be made under the section of the regulations that provides for disclosure in those emergencies.

Change: None.

Comment: Four commenters believed a condition should be added to permit disclosure without a student's consent if the agency or institution has reason to believe that the student has provided inaccurate or misleading information concerning his or her academic record to another educational agency or institution, to an employer, to a professional association, or to a governmental agency to whom the student applies for benefits or services.

Another commenter believed educational agencies and institutions should be allowed to disclose information without prior written consent to government officials, including U.S. Senators and Representatives, State legislators, and governors, who have been contacted by a parent or student who believes his or her rights under this law have been violated. The commenter indicated that the agencies or institutions are unable to respond to, or to defend themselves against, the parent's or student's allegations because they cannot release information to the government officials without the parent's or student's written consent.

Discussion: The Secretary understands the concerns of the commenters and has carefully considered whether provisions could be included in the regulations to address the problems. He has decided that the statute is specific in stating the conditions under which disclosure can be made without consent and that he has no authority to include the provisions proposed by the commenters.

Change: None.

Section 99.32 What recordkeeping requirements exist concerning requests and disclosures?

Comment: A commenter suggested that the term "list" be changed to "record" in this section. The commenter indicated that as long as a record of requests for and disclosures of information is maintained, the form of the record is irrelevant.

Discussion: The Secretary did not intend to prescribe the form of the record; the intent was to suggest a convenient way to maintain the information. However, in order to conform to the statutory language, the term "record" will be used.

Change: The term "record" has been substituted for "list."

Comment: One commenter stated that keeping a record of requests for disclosure is impractical and implies that a record must be kept even for requests that are denied. The commenter also believed it impractical to require the record of disclosure to be kept with the education records of the student, inasmuch as most institutions maintain records in computerized formats. Another commenter believed maintaining a record of disclosures without consent is self-incriminating. The commenter also stated that institutions should be free to establish their own retention schedule.

Discussion: The student requires each educational agency and institution to maintain a record, kept with the education records of each student, that will indicate all parties who have requested or obtained access to a student's education records, including those parties to whom the statute permits disclosure without consent. While the statute states that the record should be kept with the education records of a student, it does not intend to require the agency or institution to keep it in one file or in one location. However, it does intend to require the agency or institution to make the record available to a parent or student as part of the parent's or student's general access to the education records. Since parents or students should be able to learn of those parties interested in the records, the record of disclosure should be maintained as long as the agency or institution maintains records on the student.

Change: None.

Comment: A commenter asked whether the placement office of an educational agency or institution would be required to keep a list (record) of all parties to whom a student's credential files were sent if the student had given a blanket consent to release his or her education records without specifying the individual parties.

Discussion: The statutory and regulatory language require an agency or institution to maintain a record of each disclosure.

Change: None.

Comment: One commenter questioned the recordkeeping requirement concerning disclosure and redisclosure of information to parties if prior written consent for disclosure is not required. An educational agency or institution may disclose information to a party if consent is not required with the understanding that that party may redisclose the information to another party to whom information can be disclosed without consent. The agency or institution must keep a record of the parties to whom the disclosure and redisclosures are made and the legitimate educational interests all parties have in the records. The commenter believed the recordkeeping requirement places an undue burden on institutions and that most reasonable approach is to assert that no information may be redisclosed.

Discussion: The Secretary did not intend any change in the recordkeeping requirement. At the time the final regulations were issued in 1976, the Department had considered whether student consent should be required if disclosure by a party excepted from the consent requirement is to another party excepted from the consent requirement—even though the institution could disclose information without consent to either excepted party. The Secretary considered, for example, whether an institution that disclosed information to the Department of Education under the Guaranteed Student Loan Program as permitted by the "financial aid" exception, would be required to tell the Department of Education not to make a future disclosure of that information to the bank that loaned the money under the program—even though the bank could obtain the information directly from the institution under the same exception.

If the Department of Education could disclose the information freely to other excepted parties, there would be no harm done to the consent requirement. However, the student would no longer have a means to discover all of the parties outside the institution who had had access to his or her records without consent. To remedy this problem, the Secretary authorized an institution to disclose information to excepted parties with the understanding it would be redisclosed to other excepted parties, but only if a record of access were kept for all of those parties.

The Secretary did not intend to impose a recordkeeping burden on educational institutions. Rather, the intent was to give a better understanding of the disclosure and recordkeeping requirement with regard to excepted parties.

Section 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

Comment: A commenter believed an example should be inserted in this section to specify that the phrase "is enrolled in or receives service from the other agency or institution" encompasses consortia, cross-enrollment, joint-enrollment, work-study, and coordination of such programs among postsecondary institutions and participating agencies and institutions.

Discussion: The Secretary believes the provision, as it now stands, can clearly be construed to encompass the examples included in the comment.

Change: None.

Comment: None.

Discussion: The proposed regulations changed the definition of student to include former students in order to make clear that most rights accorded students in attendance also apply to former students. In cases where the provisions of a section do not apply to former students, the term "students in attendance" is used. The provision in this section that, in the proposed regulations, stated "an educational agency or institution may disclose an education record of a student to another educational agency or institution if the student is enrolled in or receives services from the other agency or institution" would extend the provision beyond the statutory authority and would indicate that an agency or institution could disclose information on former students without consent to another agency or institution if the former student is enrolled in or receives services from the other agency or institution.

Change: The provision has been clarified to state that it applies only to students in attendance.

Section 99.36 What conditions apply to disclosure of information in health and safety emergencies?

Comments: One commenter believed that the regulations, in stating that the provisions of the section "shall be strictly construed," rightly leaves it to the educational agency or institution to develop its own definition of emergency. The commenter viewed the revision as helpful to educational agencies and institutions and as a step to assure an appropriate deregulation and an appropriate recordkeeping process within the institution on defining when an emergency may arise. Another commenter believed the factors that were removed from the health and safety emergency section in revising the regulations should be reinserted. The commenter believed that the statute specifically directs the Secretary to issue regulations concerning disclosure in a health or safety emergency and also believed that the criteria provided useful guidance.

Discussion: The statute, in setting forth the conditions in which personally identifiable information from an education record or records can be disclosed without a parent's or student's consent states that "[such a disclosure may be made], subject to regulations of the Secretary in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons." The regulations required that educational agencies or institutions include four specific criteria in the factors to be taken into account in determining whether personally identifiable information from the education records of a student could be disclosed under the section.

The Secretary based his decision to remove the nonstatutory criteria from the regulations on his belief that educational agencies and institutions are capable of making those determinations without the need for Federal regulation. It is the Secretary's opinion that Congress did not intend to require that regulations be promulgated that would impose burdensome requirements on agencies and institutions. He believes the requirement that agencies and institutions strictly construe the provision fully meets the Congressional intent. Nothing in the statute or legislative history prohibits an agency or institution from considering the four specific criteria that have been removed.

Change: None.

Section 99.37 What conditions apply to disclosing directory information?

Comment: One commenter thought the use of the word "and" in the text of the first paragraph under the section was incorrect.

Discussion: In the proposed regulations the word "and" was inserted in place of the word "or" in the phrase "* * * parents of students in attendance and eligible students in attendance * * *." However, replacing the word "or" with the word "and" does not remove all possibility for misinterpreting the provision. As clarification, we note that in the phrase "parents of students in attendance," the word "students" means students who are not eligible students. Thus, the educational agency or institution must notify both, all eligible students and the parents of all students who are not eligible students.

Change: None.

Comment: A commenter, a representative of a postsecondary educational institution, believed that the refusal that student's are allowed to exercise over the designation of directory information should be limited to the students' address and telephone number. The commenter indicated that the students' right of refusal has in some cases enabled students to commit fraudulent acts with a lessened chance of discovery.

Discussion: The statute provides students the right to refuse to allow the educational agency or institution to designate any or all of the items of information about the directory information.

Change: None.

Section 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

Comment: One commenter believed the Department of Education should give some direction to State schools or institutions that are mandated by State law to allow a student to have access to confidential letters of recommendation to which the student, under FERPA, has waived his or her right of access. The commenter indicated that if placement directors send a credential file that contains confidential letters of recommendation to schools or institutions in States that have those mandates, the schools or institutions will return the file on the basis that the confidentiality of the letters cannot be protected.

Discussion: The Secretary is unable to advise State schools or institutions with respect to the laws of each State. With respect to the Federal law, the statute provides that the access rights afforded by the law shall not operate to make letters and statements of recommendation available to students in institutions of postsecondary education who have executed a valid waiver of the right to inspect and review the letters or statements. In implementing the law, the regulations provide that a postsecondary institution "does not have to permit" a student to inspect and review the letters and statements of recommendation provided the student has executed a valid waiver. Under these provisions, an educational agency or institution is not precluded from providing a student access to a letter or statement of recommendation. Therefore, if a State law requires that a State institution afford a student access to letters or statements of recommendation, the Federal law would not interfere, irrespective of whether the student has executed a valid waiver of his or her right.

Change: None.

Section 99.64 What is the complaint procedure?

Comment: A commenter proposed that the intended meaning of the word timely as it appears in the second paragraph of this section should be defined.

Discussion: The Secretary has decided not to include a definition in the regulations for two reasons. First, the word appears only once in the regulations. Secondly, the meaning of the word would depend largely on the circumstances which are peculiar to each case. A complaint might involve complex circumstances and attempts by a complainant to resolve the issue independently that might reasonably have delayed the filing of the complaint. Such a complaint would be considered timely. Another complaint might involve an allegation of a violation that occurred many years ago and was never pursued despite the full knowledge of the student. In this case, the complaint would not be considered timely.

Change: None.

Section 99.67 How does the Secretary enforce decisions?

Comment: A commenter believed the law should be changed to provide that the Secretary may decide to withhold Federal funding under programs in addition to those administered by the Department of Education.

Discussion: The Secretary has no authority to withhold Federal funds under programs in other Federal agencies.

Change: None.

[FR Doc. 88-7764 Filed 4-8-88; 8:45 am]

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